

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Aug 28 2015 02:33 p.m.
No. 67519 Tracie K. Lindeman
Clerk of Supreme Court

Appeal from a Judgment of Conviction

Case Number CR98-0074A

The Second Judicial District Court of the State of Nevada

Honorable Connie J. Steinheimer, District Judge

JOINT APPENDIX VOLUME SIX

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JUDITH ANN SCHONLAU
CCR #18
75 COURT STREET
RENO, NEVADA

COPY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

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THE STATE OF NEVADA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. CR98-0074A
)	DEPARTMENT NO. 4
SHAWN RUSSELL HARTE,)	
)	
Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
TRIAL (PENALTY PHASE)
FRIDAY, JANUARY 30, 2015, 1:30 P.M.
Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

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I N D E X

WITNESSES:	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
MELISSA PIASECKI	3	24	46	51
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1 RENO, NEVADA; FRIDAY, JANUARY 30, 2015; 1:30 P.M.

2 -oOo-

3 THE COURT: Counsel, do you have anything outside
4 the presence of the jury?

5 MR. YOUNG: State does not, Your Honor.

6 MS. PUSICH: No, Your Honor.

7 THE COURT: Please bring the jury in. Counsel will
8 you stipulate to the presence of the jury?

9 MR. YOUNG: State will, Your Honor.

10 MS. PUSICH: Yes, Your Honor.

11 THE COURT: You may call your next witness.

12 MS. PUSICH: Melissa Piasecki.

13 THE COURT: You may proceed.

14
15 MELISSA PIASECKI

16 called as a witness, having been first duly sworn,
17 took the witness stand and testified as follows:

18
19 DIRECT EXAMINATION

20 BY MS. PUSICH:

21 Q Good afternoon, Doctor. Could you please state your
22 name for the record and spell your last name?

23 A Melissa Piasecki. Last name P-I-A-S-E-C-K-I.

24 Q Doctor Piasecki, I will address you as Doctor, could

1 you please describe your education and training for the jury?

2 A Sure. So I am a medical doctor which means I went to
3 medical school. Four years of general medical education.
4 Following that, I decided I wanted a career in psychiatry, the
5 medical specialty that works with people having mental and
6 behavioral problems, so I completed a four year general
7 psychiatric training program, became certified in general
8 psychiatry, and began to practice general psychiatry for about
9 ten years. I decided what I really wanted to do was forensic
10 psychiatry. I wanted to learn more about the interfacing
11 between the law and medicine. I completed a one-year forensic
12 psychiatry fellowship. It is a one-year program of specific
13 kinds of study, experience, exposure to different kinds of
14 forensic psychiatry areas. Following that, I became certified
15 in forensics psychiatry as well.

16 Q How to you become certified?

17 A To become certified in forensic psychiatry, you have
18 to first complete a fellowship, then one year experience, and
19 then you take an examination and then you maintain your
20 certification by ongoing educational activities.

21 Q In the course of your professional career, have you
22 evaluated people accused of criminal cases?

23 A Yes.

24 Q Have you testified both for the State and the

1 defense in various cases?

2 A Yes.

3 Q Do you testify more often for one than the other?

4 A I am retained more often by the defense, so I
5 testify more often for the defense.

6 Q When you say retained, you are paid for your time,
7 correct?

8 A I am.

9 Q Are the fees the same whether you are called by the
10 State or the defense when you are called as an expert?

11 A Yes.

12 Q Was there a time when you interviewed Shawn Harte?

13 A Yes.

14 Q Do you recall approximately when?

15 A It was last May.

16 Q Did you interview him at the Ely State Prison?

17 A I did.

18 Q Where in the prison, in an interview room or in his
19 cell?

20 A It was in an interview room which had a Plexiglass
21 divider.

22 Q So you did not have a contact interview with
23 Mr. Harte?

24 A Correct.

1 Q Do you know how long you spoke to him?

2 A I think about 90 minutes.

3 Q And as part of your assessment, did you review some
4 documents?

5 A I did.

6 Q Can you please tell us what those were?

7 A Sure. So I reviewed some previous evaluation
8 documents. I reviewed his Department of Corrections file. I
9 reviewed some correspondence from Mr. Harte to somebody named
10 Rameau. I reviewed a letter another inmate wrote regarding
11 Mr. Harte. I reviewed two articles Mr. Harte had published in
12 a philosophy journal. I reviewed his transcripts from his high
13 school and college courses. And I reviewed what is called a
14 pre-sentence investigation which is something that is produced
15 as part of a criminal process.

16 Q Okay. Did you also have an order from the court that
17 let you meet with Mr. Harte in Ely?

18 A I did. I received an order for my evaluation in
19 April of 2014.

20 Q Turning first to the information that you reviewed
21 in the Department of Corrections file, would it be fair to say
22 that there are two broadly defined periods of behavior in
23 those records?

24 A I would say the records reflect two different

1 situations.

2 Q What was the first that you saw?

3 A The first situation I saw was a situation where an
4 inmate had some records that reflected some conflict within
5 the environment in terms of some verbal statements that were
6 being made and one disciplinary issue.

7 Q Do you remember what the disciplinary issue was for?

8 A The disciplinary issue was over whether or not
9 Mr. Harte had violated a rule regarding who is on someone's
10 phone list.

11 Q Do you know if there was any sort of a sanction for
12 that violation?

13 A Yes. I believe he had one-month segregation as a
14 result of violating that rule about phones.

15 Q In your review of that first period, first
16 situation, did you see any incidents of violence by Mr. Harte?

17 A No?

18 Q And you are reviewing prison records, right?

19 A Yes.

20 Q What is the second situation you observed in the
21 record?

22 A So after the first situation and again looking at
23 the appeals and so forth from the disciplinary, that is all
24 kind of one chapter. The next chapter, which is a much longer

1 chapter and most of the records are related to the second
2 chapter, are requests for books and courses.

3 Q Even though it is a disciplinary file, the bulk of
4 it is asking for reading material?

5 A Yes. I think more of an institutional file than
6 disciplinary file. It seems to have covered all the requests
7 that he made to the institution. Some of them were like
8 appeals from the disciplinary stuff. The rest appeared to be
9 related to requests for books and related to educational
10 courses.

11 Q Do you recall how late in time the information
12 regarding the telephone infractions occurred?

13 A I believe it was like '99 and 2000.

14 Q Since that time, the information you saw it
15 primarily had to do with the education and reading materials?

16 A Last fifteen years with material of papers in that
17 file related to requests for books.

18 Q Okay. During your interview with Mr. Harte, did you
19 discuss his family background?

20 A I did.

21 Q And did you reach a conclusion whether or not his
22 family background had any effect on him at the time you were
23 speaking with him?

24 A Well, our family background, my belief is it affects

1 us throughout our adulthood. So, yes, I did believe his
2 family background had an effect on him.

3 Q Do you think it had an affect on him in 1997 when
4 this crime occurred?

5 A Yes, I do.

6 Q As a result of your review of the documents and your
7 interview with Mr. Harte, did you reach any conclusion whether
8 or not he's made any progress in dealing with his background?

9 A Yes.

10 Q How do you decide that? What played into your
11 opinion?

12 A All the information I have about his family
13 background is it was a pretty dysfunctional family situation
14 and it promoted dysfunctional ways of thinking and
15 dysfunctional ways of behaving, especially toward other
16 people. And what I saw in my review of Mr. Harte's records
17 and also my interview is that he had made a very deliberate
18 and conscious effort to learn different ways of responding to
19 other people and different ways of thinking including
20 different ways of thinking about himself. So in a very
21 deliberate way, he identified dysfunctional approaches to
22 life. He had identified more progressive or functional
23 approaches to life and had made a conscious decision to change
24 away from the dysfunctional patterns that he had learned in

1 his family.

2 Q You interviewed Mr. Harte the middle of last year,
3 approximately, correct?

4 A Yes.

5 Q So he had been in custody at that point for a long
6 time?

7 A Yes.

8 Q What do you look to when you are relying on things
9 that come from Mr. Harte or anyone else to make sure that they
10 are not just telling you what they think you might want to
11 hear?

12 A So forensic psychiatry is psychiatry and the law.
13 It is different from clinical psychiatry, because I am not
14 there to treat that person or to make that person feel better.
15 My job is to come into the courtroom and to take an oath and
16 to give the triers of fact or the people making decisions an
17 honest opinion. And so I can't do that without considering
18 all of the information that is available to me including the
19 past records, including the institutional records, including
20 information other people can give me. So my job is to not
21 limit myself to talking just to the individual but to obtain
22 and evaluate all of that collateral information is what we
23 call that, collateral information and do an analysis or answer
24 the questions that have come to me from the retaining office

1 or attorney and to integrate all of that. So it is a long way
2 of saying I rely a lot through outside information.

3 Q Not just what the person you are interviewing tells
4 you?

5 A Correct.

6 Q During your interview of Mr. Harte, he did not
7 endorse or tell you about any psychotic symptoms, correct?

8 A Correct.

9 Q Were you aware that at an earlier time he had told
10 someone he was suffering from hallucinations?

11 A Correct. They did a competency evaluation and
12 things like that early on, too.

13 Q From what you observed, was his report that he was
14 not suffering any psychotic symptoms consistent?

15 A Correct. Yes.

16 Q As part of your interview of Mr. Harte and review of
17 his family background, in your experience, do people try in
18 public to put for example their best foot forward?

19 A In general, people are trying to make a social
20 impression. They are trying to be conscious of how they
21 appear to others. And so often that does include putting your
22 best foot forward.

23 Q Do you know if families, even ones dysfunctional,
24 try and do that, too?

1 A I think dysfunctional families try very hard to not
2 allow their dysfunction to show outside of the family.

3 Q Mr. Harte described a circumstances where he had
4 suffered abuse at the hand of his stepfather, and then the
5 result was that he was moved to a group home. Would that be
6 consistent with we dont want anybody outside of the family to
7 realize was is going on here?

8 A There is a term sometimes that is used which is
9 blame the victim in terms of a child in a dysfunctional
10 family. That it might be an example of dysfunction within all
11 or part of the family, but only the child is identified as the
12 problem.

13 Q Do people mature at different speeds?

14 A Absolutely.

15 Q What would be the norm or general, I realize that is
16 a very broad progression, to mature for a young man?

17 A So if we look at combined data, instead of saying
18 one person, because there is a bit of a range, so if we look
19 at combined data, and if we follow combined data from ten
20 years old, eleven years old, fourteen years old, eighteen
21 years old, what we see is a gradual progression of brain
22 development during adolescence. We notice that brain
23 development. If you look at an eighteen year old and nineteen
24 year old, it is actually not a fully mature brain even at that

1 time. In general, individuals have a brain, an adolescent
2 brain development process that is occurring in adolescents and
3 finishing, in general, in early twenties. Early adulthood.

4 Q Did Mr. Harte describe to you a progress that he had
5 experienced toward more mature, more appropriate behavior?

6 A So with Mr. Harte, what is interesting is
7 intellectually he appears to have had a developmental process
8 or maturity that was intellectually somewhat advanced. He was,
9 I believe, a very smart kid and remained a very smart adult.
10 He didn't have developmental delay in terms of his ability to
11 use words or math concepts or things like that. I think that
12 part of his development was on track or advanced.

13 It does appear he had some delays in what we would
14 call moral development. Moral development is a little bit
15 more nuanced than whether somebody can get a score on a math
16 test. It appears that he had some significant lag in ability
17 to identify some basic things about interpersonal
18 relationships and about the impact of one's behavior on
19 another person. And from his history, it appears that he had
20 sort of a developmental catch up in that area in his mid
21 twenties.

22 Q Would that be consistent with that maturation
23 process you described across many people?

24 A It would be. It would represent a little bit of lag

1 in the moral development, being a little later than you may
2 see in other individuals.

3 Q In your report, there is a discussion of empathy,
4 correct?

5 A Yes.

6 Q What are you including in empathy?

7 A Empathy is being able to understand what another
8 person is experiencing. It is different from sympathy.
9 Sympathy is knowing somebody is having a hard time and feel
10 bad for them. Empathy is different. Empathy is more having
11 some kind of connection or resonance with another person's
12 emotional state.

13 Q In your conversation with Mr. Harte, did he describe
14 a process where he was able to recognize and develop empathy?

15 A He described sort of discovering feelings that he
16 hadn't had before and then realizing they were feelings of
17 empathy. He had a process of, again, sort of a delay in his
18 awareness of other people's emotional state.

19 Q Do you recall about how old he said he was when that
20 happened?

21 A About twenty-three.

22 Q So after he's been in custody for a while?

23 A Yes.

24 Q Were you asked to determine whether or not Mr. Harte

1 might me able to progress to the level of not being a future
2 danger in the community?

3 A I'm not sure that I can answer the question exactly
4 as you asked it.

5 Q Okay. What could he do in the next 23 years that
6 would make him less of a danger in the future if he were ever
7 to be released?

8 A So one of the ways that we look at an individual's
9 risk is what are their risk factors, their specific risk
10 factors for dangerousness. One of those risk factors is age.
11 If we just look at the violence in our society, there is a
12 huge peak of violence for adolescent males ages 17 to 21.
13 Just a lot, looking at the demographics, there is a lot of
14 violence in that group. So one of the things that happens,
15 people just get older and mature and some of that brain
16 maturity. And so one of the things that he can and will do is
17 just continue to mature. Just continue to grow older. And
18 with increasing age, the risk of violence decreases.

19 Q I am just going to call them protective factors. It
20 is easy for me to think that way. Clearly there are some
21 people in our world that have achieved the age of 50, 60, 70
22 who still have been involved in considerable violence. What
23 protective factors did you observe in Mr. Harte that would
24 assure us that is less likely with him?

1 A Sure. Some of the protective factors are increasing
2 his educational attainment. Increasing his skills in terms of
3 interpersonal functioning and building and sustaining
4 relationships with other people. Those are protective factors
5 in terms of long term risk of violence. He also has, in terms
6 of protective factors, and this is something that is related
7 to what we were talking about earlier which is that increased
8 moral development. That he has at this time a much more
9 developed understanding of right and wrong and what is a
10 meaningful, a meaningful and sustainable way to be in the
11 world as it relates to other people.

12 Q The protective factors we discussed, the information
13 that you got from the institutional file, all those things,
14 those things have happened while Mr. Harte has been in
15 custody. Does that mean the only place he can maintain
16 appropriate behavior is in custody?

17 A I don't think so.

18 Q Why not?

19 A Because I think that the protective factors and the
20 behaviors that we are talking about, I think they generalize
21 to other situations as well. I don't think that all of the
22 maturation that he has had goes away in a different
23 environment. I don't think that the educational and
24 interpersonal gains he's made go away when he's in a different

1 environment. I think these are sustained and probably
2 progressive protective factors in the sense that over time,
3 the amount of protection that he gives in terms of risk of
4 dangerousness continue to grow.

5 Q A person who is in a very limited environment learns
6 to deal with that environment. If Mr. Harte were ever to be
7 granted parole, he's going to be in a very different
8 environment. Does he need to have interactions with those
9 other types of people, not inmates of the Nevada Department of
10 Corrections, to be able to function with them in the world?

11 A I think that everyone who has spent a lot of time in
12 a prison environment and transitions into a non-prison
13 environment needs the opportunity to reorient and to learn
14 skills that they haven't used in ten, twenty years. When I
15 think about the technology that has changed in the last ten
16 years, you can imagine just in terms of that what a big leap
17 that would be.

18 For Mr. Harte, the same would be true in terms of
19 developing the skills to manage other environments, but also
20 the ability to apply what he's learned, has been practicing
21 inside the prison in terms of his interpersonal and
22 intrapersonal things that he is working on for his own
23 personal development. He would need the opportunity to learn
24 how to use those in a new environment. That is why the

1 transition from a controlled prison environment to the
2 community often includes specific transitional programing.

3 Q Is it important to your assessment that Mr. Harte
4 isn't just looking introspectively but tried to help people
5 beyond himself?

6 A It is important.

7 Q How?

8 A For the purpose of my opinion say today, it is
9 because other people can tell me that they have experienced
10 this with him, not just him saying I have been working on
11 myself and feel I am doing a good job. It is other people
12 saying he's brought out the best in me. He's been generous and
13 kind and loving towards me, and as a result of that, I have
14 gained as a person. So it is helpful to me. It gives me so
15 much more context for what his impact is and what his -- what
16 level of skill he has.

17 Q Did you have the opportunity to review a letter from
18 an inmate that was writing on behalf of Mr. Harte?

19 A Yes.

20 Q Was that Mr. Castillo?

21 A Yes.

22 Q Is that the type of information that is useful to
23 you in deciding he's reaching out and touching others?

24 A Yes.

1 Q You mentioned earlier that you had an opportunity to
2 review a letter to a child named Rameau?

3 A Yes.

4 Q Is that also the type of information that plays a
5 part, in your opinion, he's reaching out and that, hopefully,
6 he's going beyond himself?

7 A Exactly. Otherwise, it would be impossible to know
8 if he had the capacity to do that. But this is evidence that
9 he does.

10 Q Have you had an opportunity to speak with Janine
11 Marshall?

12 A I have.

13 Q What effect, if any, does Mr. Harte's relationship
14 with her have on your assessment of his ability to function if
15 released?

16 A It speaks to his ability to create and sustain
17 meaningful relationships, relationships that are productive
18 and helpful to other people including people that are not
19 other inmates. So it is a big leap to go from relating and
20 supporting somebody in the cell next to you to relating and
21 supporting somebody who is half a world away.

22 Q What effect would that have if for some reason the
23 relationship doesn't survive the next 23 years which would be
24 the earliest Mr. Harte could apply for parole if he were given

1 that opportunity at all?

2 A Part of my assessment includes relationship history.
3 I looked at whether or not this is the only relationship he
4 had ever had or had previous relationships since incarcerated.
5 He has had a number of previous relationships I learned that
6 were also long term, so sustained more than a year, and that
7 were based on principals of mutual respect and mutual
8 interests, self discovery, principals of some of the
9 philosophical principals he's been studying and writing. In
10 fact, the letter to Rameau you mentioned earlier could be seen
11 by somebody who was one of these previous relationships.

12 Q What is the best predictor of future behavior?

13 A The best predictor of future behavior is past
14 behavior.

15 Q In this case, Mr. Harte has both, some horrific past
16 behavior, that is why we are here, and then a period of better
17 behavior. How do you weigh those? Is one a better predictor
18 than the other?

19 A There is no mathematical way to put that information
20 and come up with a specific answer. There is no scientific or
21 mathematical formula that allows us to do that. It becomes
22 more a question of clinical judgment and weighing the factors
23 we know are risk and protective factors. There is horrific
24 violence in this case, but there is only one episode of

1 horrific violence, so it is not a sustained matter that's a
2 factor.

3 Q In this case, obviously, Mr. Castro is the primary
4 victim. He died as a result of Mr. Harte's behavior, but the
5 jury has learned there was an earlier incident only a few
6 weeks before where other people were significantly at risk.
7 Good fortune for all of them, they survived. Does that change
8 what is not one incident but is a series over a period of
9 several weeks or months?

10 A It is more of a cluster effect. This isn't somebody
11 who has a history of sustained aggression and violence towards
12 another over a long period of time.

13 Q What effect does his later letter a year after and
14 he's been in custody where he's saying outrageously offensive
15 things and he's talking about being threatening and dangerous
16 in custody, what effect does that have?

17 A In terms of his overall risk?

18 Q Correct.

19 Q By itself, it is hard to say it has much of an
20 effect. In the absence of any other evidence that he adheres
21 to those beliefs, that he acted out on those beliefs, the
22 absence of anything following that letter sort of diminishes
23 the effect of that letter. If there was any behavior
24 consistent with that letter, then it would be a much more

1 important factor.

2 Q What-- how do you view the letter, itself?

3 A When I first read the letter, it was appalling. It
4 was almost like somebody tried to do their very best to write
5 the worst possible things possible. Somebody made an effort to
6 just write the most outrageous and appalling letter possible.
7 So I was very curious about it. How could this be? What would
8 lead to this? So I asked Mr. Harte about it.

9 Q And today, how do you view that? What was going on?
10 How did that even get written?

11 A The understanding I have now, based on talking with
12 him, looking at the letter and contents, it happened when he
13 was a young man who at the time had very limited ability to
14 understand or appreciate the impact his words and actions had
15 on other people. He was very aware only of his needs at that
16 time. And when he wrote the letter, I believe he was trying
17 to position himself as somebody who would do well in prison. I
18 believe it was a letter that he was trying put on the persona
19 of a really tough person who was going to do well in prison,
20 who was going to be so tough, that he was going to survive in
21 a prison environment.

22 Q So it is for himself?

23 A I think there was a lot of bravado. I think some of
24 it had to do with not knowing what was going to happen in

1 prison and being very worried about it. The tougher he could
2 look going in, the more or the tougher he could feel going in,
3 the better his chances were of surviving in prison.

4 Q And from your review of the institutional file from
5 the Nevada Department of Corrections, none of the outrageous
6 things he threatened has happened when he got to prison, ever
7 happened, correct?

8 A Correct. When I asked him about have you ever
9 considered any of these behaviors you wrote about, he told me
10 at this time the letter is an embarrassment to him. He looks
11 at it and feels embarrassed by it.

12 Q Is consistency important in deciding how a person is
13 going to behave down the road?

14 A Behavioral consistency is important. Sustaining a
15 behavior is important, yes.

16 Q Can you give me an example of a circumstance where
17 the longer someone does something, the more comfortable we are
18 that is the way they are going to continue to behave?

19 A I think it is better. That is something that
20 happens all the time. People who smoke and quit smoking, what
21 is the best predictor they are going to stay away from
22 cigarettes, tobacco? The length of time. The longer you get
23 away from your quit date, the more likely it is you are going
24 to have a sustained life abstinence from tobacco. Another way

1 of looking at the same kind of issue, what is somebody's risk
2 of lung cancer after they quit smoking? The longer their
3 period of time is since they quit smoking, the less the risk
4 of that lung cancer. We know that not just because of the
5 medical study, but insurance companies and life insurance
6 companies. If anybody ever applied for life insurance, the
7 longer they get away having tobacco on their insurance
8 application, the more likely the rates go down. It is because
9 the risk goes down over time.

10 Q Is it true when you have someone who has displayed a
11 long period of nonviolent behavior?

12 A The same is true for sustaining all types of
13 behavior. So nonviolent behavior would be one of those, yes

14 MS. PUSICH: Thank you, Doctor. Thank you, Your
15 Honor.

16 THE COURT: Cross-examination.

17 MR. YOUNG: Thank you, Your Honor.

18
19 CROSS-EXAMINATION

20 BY MR. YOUNG:

21 Q Doctor Piasecki, good afternoon. My name is Zach
22 Young. One of the prosecutors on the case, okay?

23 A Good afternoon.

24 Q You discussed that you began as a general

1 psychiatrist and then transferred to forensic psychiatry?

2 A Yes.

3 Q Could you explain, you discussed forensic psychology
4 involves the law?

5 A Correct.

6 Q How does that differ from just general psychiatry?

7 A So general psychiatry is the care and treatment of
8 people, and your goal there is to meet the needs of your
9 patient. Your duty is to the patient. And so you are a
10 clinician, and you do your very best to help the patient be
11 well.

12 Forensic psychiatry you are an evaluator. You are
13 no longer focussed on your duty to the patient. You focus on
14 the duty to the Court, the duty to having an objective opinion
15 that informs a legal process.

16 Q I want to talk briefly about clinical psychiatry.

17 A Sure.

18 Q Where you are trying to help the patient be well.
19 Typical, or is it always the patient will come to you seeking
20 help?

21 A Typically people self-refer, yes. Sometimes they
22 get referred by other people. So sometimes a spouse will
23 bring somebody in or a judge will order somebody into
24 treatment. Typically, it is self-referred.

1 Q Let's talk about that typical setting. If I am
2 having interpersonal issues or otherwise, I will come and pay
3 for your services in a clinical setting, and you will help me
4 do better?

5 A Right.

6 Q Okay. In such a situation, does the patient, is
7 that the right word?

8 A Uh-huh.

9 Q Does the patient have an interest or an incentive to
10 be honest with you?

11 A Yes.

12 Q Specifically, that is because they are their for
13 there own self- betterment. They are open to self-growth.
14 They come to you specifically because they want to be there?

15 A It is in their interest to tell me the truth, so
16 that I can do my best to help them.

17 Q Now with forensic psychiatry, a court order, as in
18 this case, Dr. Piasecki, you are ordered to go meet with so
19 and so defendant, in this instance, Shawn Harte, correct?

20 A Yes.

21 Q That began, the Court order was based on defense
22 counsel's request for your involvement, fair?

23 A Yes.

24 Q Now when you met with Mr. Harte out at Ely, you said

1 that you were in the same room but it was divided by a
2 Plexiglass or some sort of a glass divider?

3 A It is like a booth. The booth has a divider, and
4 there is also some screened area that allows for being able to
5 hear each other.

6 Q So you are not in -- Well, maybe theoretically in
7 the same room, you are not able to physically touch one
8 another?

9 A Correct.

10 Q Now your report lists a number of items that you
11 were provided as part of your evaluation, and you discussed
12 those at the beginning, correct?

13 A Yes.

14 Q Okay. The two things I believe you discussed or
15 mentioned when you were talking about what you were provided
16 but we really didn't get into, was a psychiatric assessment
17 back in 2002 and a psychological evaluation in '02 as well,
18 correct?

19 A Yes.

20 Q Both of those were assessments or evaluations of
21 Shawn Harte?

22 A Yes.

23 Q They were from, one was a psychiatrist, one was a
24 psychologist, but those were different individuals and neither

1 was you?

2 A Correct.

3 Q And did you read those and have that when you did
4 your assessment in this case?

5 A I did.

6 Q The interview that you did with Mr. Harte personally
7 when you are talking about through that Plexiglass, was you
8 said May of 2014, correct?

9 A Yes.

10 Q And that was, as I understand, the only time that
11 you have had a face-to-face sit down with Mr. Harte?

12 A Correct.

13 Q Now you read, again, as you put in the first page of
14 your statement, a letter from William Castillo that was
15 written in I believe June of last year, correct?

16 A I'm not sure. Yes. It was June of last year, yes.

17 Q Did you speak with Mr. Castillo at all in person or
18 just review the letter?

19 A I just reviewed the letter.

20 Q Okay. Now you were discussing, correct me if I am
21 wrong, I may have misunderstood you, that it is important to
22 understand what other people are saying about your client or
23 your patient to kind of assure some accuracy, if you will.

24 Did I get that right?

1 A One small correction I would make.

2 Q Please.

3 Q Not my patient, because I am not going to be a
4 clinician in that role, just an evaluator. So the defendant,
5 so to speak. But it is important for me to obtain information
6 from other sources, and typically that is other people writing
7 things or documents that come from other people.

8 Q Okay. So in this instance, who did you speak with? I
9 understand you spoke with Mr. Harte. I understand you spoke
10 with Ms. Janine Marshall?

11 A Yes.

12 Q With Ms. Marshall was that over the phone or
13 face-to-face?

14 A Face-to-face.

15 Q Was that once as well?

16 A Yes.

17 Q Other than those two, Mr. Harte and Ms. Marshall,
18 who did you speak with about your evaluation regarding
19 Mr. Harte?

20 A Those are the only people I spoke with.

21 Q Okay. You didn't speak with any of the prison
22 guards or officials out at Ely, correct?

23 A No.

24 Q You already said you didn't speak with Mr. Castillo,

1 didn't speak with any of the other inmates who regularly are
2 around Mr. Harte?

3 A Correct.

4 Q Now your report does not reference a review of the
5 letter that Mr. Harte wrote back in 1998. But as I understand
6 your testimony, you did read that letter?

7 A Yes. I think it was a letter that existed in the
8 psychological evaluation, the whole letter, and also in the
9 pre-sentence investigation.

10 Q That is fine. I just want to know what it was. So
11 you did read the entire letter or excerpts of it or do you
12 recall?

13 A I believe it was the whole letter.

14 Q Did you ever read or review the police reports
15 related to this case?

16 A I don't think I did.

17 Q Did you watch the reported interview of Mr. Harte as
18 related to this case?

19 A I did not.

20 Q There was a transcript of that interview. Did you
21 read that?

22 A I did not.

23 Q Now you mentioned you did review the Department of
24 Corrections file of Mr. Harte over the last 17 years?

1 A Yes.

2 Q You mentioned that, as I understand, there was two I
3 think you used the word situations, two time frames or two
4 points, the first being there was a conflict in the
5 environment regarding statements that Mr. Harte had made and a
6 disciplinary issue?

7 A Yes.

8 Q Secondarily, the books, the request for books and
9 the request for educational opportunity and the like?

10 A Yes.

11 Q I want to talk about that first. Saying, for lack
12 of a better word is that the disciplinary issue was related to
13 the phone system and some things Mr. Harte did related to
14 that, correct?

15 A Yes.

16 Q And your testimony was that, based on that issue,
17 the discipline he faced was approximately one month of
18 solitary segregation, correct?

19 A Yes.

20 Q Because of your forensic psychiatry background, are
21 you familiar with the way the prison system in Nevada is set
22 up?

23 A Not entirely.

24 Q Mr. Harte testified yesterday that a lot of the

1 prison setting is an incentive or reward based environment. In
2 other words, if you do well, you might have some perks and
3 privileges that go away if you do things including a
4 disciplinary punishment related to the phone system, fair?

5 A Yes.

6 Q That makes sense to you, right?

7 A Yes.

8 Q So you stated that this phone disciplinary issue was
9 I believe you said '99 or 2000?

10 A I believe so, yes.

11 Q And are you aware that, based on when the arrest was
12 made and when Mr. Harte was first moved to Ely State Prison
13 was about that time?

14 A Right.

15 Q So early on, Mr. Harte learned, while I am in
16 prison, if I do things against the rules, there are
17 consequences to that, fair?

18 A Yes.

19 Q All right. Do you know how Ely is set up as far as
20 restrictions?

21 A No, I don't.

22 Q Do you know what restrictions are put in place on
23 Mr. Harte?

24 A I don't. The visitation that I had was a phone

1 contact visit. But my understanding was that it was
2 noncontact because of the day of the week I was there. I could
3 have had a contact visit if it had been scheduled on a
4 different day of the week. That's really all I know.

5 Q It is very structured in the prison setting?

6 A Yes.

7 Q As we kind of discussed with the disciplinary
8 format?

9 A Yes.

10 Q As far as how many hours one might be out of the
11 their cell, there has been some testimony to that. You don't
12 know how many hours a day Mr. Harte is allowed out of his
13 cell?

14 A No.

15 Q Do you know Ely is a maximum security prison?

16 A Yes.

17 Q Now you mentioned in your testimony that the best
18 predictor of future behavior is past behavior?

19 A Yes.

20 Q That is exactly what you said, right?

21 A Yes.

22 Q And you stated that there was one episode of
23 horrific behavior is what I wrote down?

24 A Yes.

1 Q And you stated that there was, again what I wrote
2 down, no history with respect to Mr. Harte of aggression?

3 A No aggression outside of that cluster of very, very
4 violent behavior.

5 Q Just so we are clear, what cluster are you talking
6 about?

7 A So I'm referring to the shooting in 1997.

8 Q Which one?

9 A Of the victim of the --

10 Q John Castro?

11 A Of Mr. Castro, and then it has been reported to me,
12 I am not sure, I think it was in the PSI, I am not sure where
13 I saw this, I am sorry, of another incident involving shooting
14 and it was in Fallon, Nevada, but I don't have the exact
15 information with me on that.

16 Q Let's talk about that. Did you review the list of
17 reports related to the Fallon shooting?

18 A I did not.

19 Q Or any of the interviews or interview of Mr. Harte
20 related to the Fallon shooting?

21 A I don't recall seeing that, no.

22 Q Did Mr. Harte discuss with you the Fallon shooting
23 at all?

24 A No. I don't believe I asked him about it.

1 Q So to use your word, the cluster is the Fallon
2 shooting and the murder of Castro here in Reno?

3 A Yes.

4 Q Did you know or was it discussed by Mr. Harte about
5 his thoughts having a shootout with the police again in that
6 general time frame?

7 A It wasn't discussed with Mr. Harte. I don't recall
8 seeing that in my review either.

9 Q Okay. Did you know that Mr. Harte, other than the --
10 well, you didn't really know much about the Fallon shooting,
11 correct?

12 A Correct.

13 Q Do you know why it was Mr. Harte was shooting at a
14 vehicle?

15 A I believe it was an intended robbery.

16 Q And did you know Mr. Harte and Ms. Babb and
17 Mr. Sirex, his co-defendants had discussed and planned out
18 other armed robberies?

19 A I don't think I was aware of that.

20 Q Do you know how long Mr. Harte had had discussions
21 about or thoughts of killing people?

22 A No.

23 Q If I told you Mr. Harte testified that from the age
24 of 14 until 20 when he was arrested, he had thoughts of

1 killing people. Would that expand the cluster that you were
2 just describing?

3 A Typically, when we try and assess risk, we base it
4 on behavior, so the actual actions that people take more than
5 their thoughts or ideas or statements. So it is typically more
6 what is the behavior that was observed.

7 Q So the fact that he thought of killing people for
8 six years up until he was incarcerated, that doesn't play any
9 part in your analysis?

10 A It doesn't play as much of a part as actual observed
11 behaviors.

12 Q All right. The letter, we just keep referring to it
13 as the letter, just so we are clear, the letter he wrote to
14 Lanette Bagby about what he had done that you described, we
15 are talking about the same letter, correct?

16 A Yes.

17 Q Your word was "appalling" right?

18 A Yes.

19 Q I wrote this down as best as I could. You said he
20 tried to write the most outrageous and appalling letter
21 possible. At least I think that is what you testified to.

22 A I think my testimony was it appeared as though this
23 was a letter by someone that was trying to write the most
24 outrage and appalling letter possible. It was such an extreme

1 letter.

2 Q As I understand your testimony, you read that letter
3 through other reports?

4 A Yes.

5 Q So you didn't discuss that letter with Mr. Harte,
6 exactly?

7 A I did discuss the letter and the contents of the
8 letter with him.

9 Q Did you go over with him those parts of the letter
10 which were true?

11 A I didn't break down the letter into the different
12 elements.

13 Q Are you aware that the majority of what is contained
14 in that letter recites and depicts actual events that he did?

15 A Yes.

16 Q And are you aware there was one part that started
17 talking about no remorse, and it was easy, and it was funny.
18 I think his exact words were taking out the trash only easier
19 and funner. Do you recall that line?

20 A Yes.

21 Q Are you aware that at the time he wrote that letter,
22 I can get that if you need me to, at the time he wrote that
23 letter his testimony is that is how he actually felt?

24 A Yes.

1 Q So in at least these instances, he's not trying to
2 be appalling. He's reciting his actual feelings, fair?

3 A If that was his testimony. Was that his testimony
4 during these hearings?

5 Q Suppose yesterday, hypothetically since you weren't
6 here, suppose he did testify at the time he wrote the letter
7 those were his feelings. Now he may have changed off that,
8 but at the time he wrote that letter, those were his feelings.
9 So that would not be him simply trying to write the most
10 outrageous and appalling letter possible, right?

11 A Right.

12 Q And you used the word he was trying to make, your
13 word, a persona for himself as he was going to prison?

14 A Yes.

15 Q Mr. Harte used that exact same word when he
16 testified in this hearing. Was that a word you and he had
17 discussed when you met with him?

18 A I don't think so.

19 Q So it is just coincidence you both used that same
20 description, it was him trying to establish a persona for
21 himself?

22 A I think so.

23 Q Did you know some of the things in that letter he
24 wrote, specifically the methods of killing, do you recall

1 reading that?

2 A Yes.

3 Q Did you know he had some literature at his house
4 that was located during the execution of the Search Warrant
5 which discussed those exact same four methods of killing?

6 A I don't think I knew that.

7 Q If I told you there was some literature found that
8 discussed those same four methods, again, that would suggest
9 that that part was true versus trying to be outrageous and
10 appalling, right?

11 A Yes.

12 Q Okay. With you, Mr. Harte did not claim, as I
13 understand your testimony, any psychotic symptoms?

14 A Correct.

15 Q And I believe you testified that you are aware that
16 previously he had reported psychiatric symptoms?

17 A Correct. What I would like to do is clarify.
18 Mr. Harte has described, described to me some, they are called
19 kind of a special kind of phenomenon that happens when people
20 fall asleep and wake up as a twilight zone. He had described
21 to me those phenomenon of going to sleep and waking up. They
22 are actually called hallucinations, but they are not the kind
23 of hallucinations that cause people when wide awake to have a
24 break with reality. I want to mention that.

1 Q I am going to have you repeat that for me. I didn't
2 quite follow that.

3 A So there is a psychotic system that means a break
4 with reality. My understanding is Mr. Harte had a competency
5 evaluation by Dr. Howle because there was some concern about
6 his competency way back when this was going on. And I think
7 that was because there was concern about some psychotic
8 symptoms. When I met with Mr. Harte, he did not say he was
9 hearing voices. He did not say -- He denied hearing voices.
10 He denied having thoughts that were bizarre beliefs, things we
11 would think of, sort of delusional thoughts. But he described
12 having what are considered kind of minor hallucinations, the
13 kind of phenomenon that happens to some people when they fall
14 asleep and wake up. There is a little bit of hallucination
15 experience during that twilight zone, not when he's awake, not
16 when he was talking to me.

17 Q So in the part between falling asleep and waking up,
18 literally in those moments a person is waking up?

19 A Right. They are called hypnopompic and hypnagogic.
20 It is more a sleep disorder than psychiatric disorder.

21 Q You mentioned Dr. Howle. You said from a
22 psychiatric evaluation way back. Are you talking about an
23 evaluation in about 1997?

24 A '97, '98, around there, yes.

1 Q And related to his discharge from the Army?

2 A No. I think it was a competency evaluation for
3 competency to stand trial.

4 Q Are you aware or did Mr. Harte ever share with
5 you -- Let me back up. That was a terrible start. Are you
6 aware Mr. Harte served in the Army?

7 A Yes.

8 Q Okay. Are you aware of the reason for Mr. Harte's
9 discharge from the Army?

10 A I believe I read about that. I don't think I talked
11 to him about that. But I believe I read it in one of the other
12 evaluations, yes.

13 Q That was Dr. Bitker's evaluation?

14 A Yes. Yes.

15 Q And what was your understanding -- So you didn't
16 speak to Mr. Harte. Your knowledge of this is based on Dr.
17 Bitker's 2002 psychiatric evaluation?

18 A Yes.

19 Q What was your understanding of how Mr. Harte
20 effected his discharge from the Army?

21 A That he presented to have had hallucinations.

22 Q So we are not talking about this as your waking up
23 hallucination. You described it as more of a sleeping
24 disorder?

1 A Correct.

2 Q His report was I am suffering from hallucinations?

3 A Right.

4 Q Based on that, you are aware from reading the report
5 that the evaluation came back that he has some mental issues,
6 and because of that, he was discharged from the Army?

7 A Correct.

8 Q And are you aware that that was not an accurate
9 representation?

10 A Correct.

11 Q So Mr. Harte was able to, in a psychiatric
12 evaluation, make a self-report of something which was not true
13 and receive a benefit from it, fair?

14 A Yes.

15 Q Now in your evaluation and in your report you
16 discuss Mr. Harte no longer meets the criteria for a
17 personality disorder?

18 A Yes.

19 Q Then you say but he still does have some
20 narcissistic traits?

21 A Yes.

22 Q Let's break that down into both of them.

23 A Okay.

24 Q At one point he was diagnosed as having a

1 personality disorder?

2 A Yes.

3 Q Again, in relying on -- is that relying on Bitker's
4 and Dr. Moriarte's report from 2002?

5 A Yes.

6 Q Based on -- And you used Dr. Bitker's evaluation in
7 forming your own opinions in this case?

8 A Yes.

9 Q So what diagnosis did Dr. Bitker make of Shawn
10 Harte?

11 A So Dr. Bitker made a diagnosis of mixed personality
12 disorder.

13 Q Okay. He makes a diagnosis of mixed personality
14 disorder with narcissistic border line obsessive schizoid
15 schizotypal and antisocial features, correct?

16 A Yes.

17 Q As a lay person talking to me, what does that mean?

18 A It means Dr. Bitker saw Mr. Harte as somebody who
19 had many maladaptive qualities in terms of interpersonal
20 relationships.

21 Q Schizoid and schizotypal, what is that?

22 A Schizoid means sort of aloof. Schizotypal means
23 somebody who has like magical thinking.

24 Q And it is your opinion, after your evaluation, that

1 he no longer, you would no longer diagnose him as that or you
2 would?

3 A What I wrote in my evaluation at the time of my
4 assessment, he still had some interpersonal difficulty.
5 Personality disorders are mainly problems with other people.
6 Mr. Harte, when I met with him, I thought he still had some
7 problems with other people. I didn't think it went up to the
8 level of this kind of pervasive personality disorder.

9 Q Bu he still has narcissistic traits?

10 A Yes.

11 Q Narcissistic is what?

12 A It is a sense of self-being. Somewhat different
13 than others. Perhaps different in a way that includes, for
14 different people, could be special in a way. Deserving of
15 special treatment. Superior to others. Narcissism relating to
16 having that sort of perhaps inflated sense of self relative to
17 others.

18 Q And Shawn Harte still feels that way in some ways,
19 right?

20 A That is my assessment based on all of my records
21 reviewed and also my interview with him.

22 Q Of course, there is no way to see, away from your
23 last comment about your analysis based on your contact and
24 your review, there is no way you can sit here and tell the

1 jury with any certainty that you know Shawn Harte upon release
2 from prison, if that is what the sentence is, will not engage
3 in criminal activity, right?

4 A There is no way I could say that about anybody.

5 Q And there is no way that you could say about anybody
6 or since we are dealing with Shawn Harte, Shawn Harte won't
7 engage in violent activity should he be released, right?

8 A Again, that is sort of an absolute statement. There
9 is no way I wouldn't be able to say that about Mr. Harte or
10 anyone else.

11 Q Right. I am not being facetious here. You are not
12 a mind reader.

13 A Right.

14 Q There is no way you can predict with any certainty
15 what anybody including Mr. Harte would do tomorrow or in
16 twenty-three years or fifty years, fair?

17 A Correct. There is no absolute yes or no prediction.
18 It is more of a relative risk or a continuum of risks.

19 Q Sure.

20 MR. YOUNG: Court's indulgence, Your Honor?

21 THE COURT: Yes.

22 MR YOUNG: Thank you, Doctor. That's all the
23 questions I have, Your Honor.

24 THE COURT: Redirect.

1 MS. PUSICH: Thank you, Your Honor.

2

3 REDIRECT EXAMINATION

4 BY MS. PUSICH

5 Q Doctor Piasecki, isn't it true there are groups in
6 the world that tend to have more narcissistic features than
7 others?

8 A Groups?

9 Q Doctors and lawyers might be two?

10 A Oh, my. There are narcissistic personality traits
11 that we see in business people. I think that if we look at
12 doctors, you would say, well, pediatricians don't seem that
13 way so much, but surgeons may be a little bit more. So there
14 is a continuum of narcissistic traits in the general
15 population.

16 Q Simply having that trait doesn't necessarily tell us
17 anything pathological about a person, correct?

18 A The trait in itself, by indicating a trait or
19 identifying it as a trait suggests that it is present. That
20 may not promote friendships everywhere you go, but it is not
21 up to the level of disorder where it is causing difficulty and
22 dysfunction.

23 Q When you talk about observing some of that with
24 Mr. Harte, is it to the level of causing difficulty and

1 dysfunction today?

2 A In fact, I would say it is sort of the opposite,
3 because somebody who was really -- How I would think of having
4 the disorder goes from the trait up to the more intense level
5 of narcissism of having the disorder. That is somebody who
6 would have a hard time giving to other people and investing in
7 other people's welfare. Somebody with a disorder would rather
8 be expecting other people to invest in their welfare rather
9 than the other way around. And what I see is Mr. Harte's
10 narcissism does not get in the way of being able to help
11 Mr. Castillo have a good relationship with Janine, with things
12 I am able to see the behavioral evidence of his actions.

13 Q Is psychiatry like other branches of medicine,
14 diagnoses may change over time?

15 A Yes.

16 Q You described it is not quite psychotic delusion and
17 twilight. Is that a person starting to wake up and doesn't
18 know the difference between this is part of my dreaming and
19 this is part of my life?

20 A It is very much like that, maybe a little bit more
21 intense. Again, it is considered within the realm of sleep
22 disorder rather than psychiatric disorder.

23 Q Generally, the person wakes up and realizes what is
24 real?

1 A Yes. And they have vivid recall of those twilight
2 dream-like hallucinatory moments.

3 Q But can function in the world despite them?

4 A Yes. Because they are not having any kind of
5 psychotic symptoms during their awake period.

6 Q The discussion you had with Mr. Young about the
7 things Mr. Harte had been involved in, the bad things
8 Mr. Harte had been involved in before his arrest in this case
9 and shortly after that, that doesn't change your two
10 situations in the time frame of the prison, correct? We have
11 extraordinary bad behavior in several different levels before
12 approximately 2002, 2001 and a long pattern of good behavior
13 for the last dozen or so years?

14 A It doesn't change. It is a consistent trajectory.
15 If you look at the path, it isn't there are intervals of good
16 and bad. It is all bad then trends to all good.

17 Q Your review of Mr. Harte's background and
18 circumstances, he hasn't been given medication or treatment
19 for any psychiatric condition, correct?

20 A I haven't seen any evidence of that in the prison
21 file or the jail file.

22 Q So the growth and development he has accomplished
23 after working hard to accomplish those things?

24 A It has been sort of, we think about counseling and

1 therapy as ways people can change, and this is a form of that
2 only it is self-administered.

3 Q How can you be confident Mr. Harte wasn't responding
4 during your interview in a way that was designed to skew your
5 findings?

6 A The most important way I can be confident is looking
7 at other sources of information in addition to my interview
8 with Mr. Harte.

9 Q At the beginning of Mr. Harte's time in the Nevada
10 Department of Corrections, he had some write-ups for what you
11 characterize as statements. Isn't it true those statements
12 were not regarding violence. He got in trouble because they
13 were disrespectful?

14 A Correct. It was interpersonal conflict based on
15 statements not any kind of behavior.

16 Q And the distinction you are making between --
17 Certainly we understand that there is the Churchill County
18 case and our current case which were just horrible, but there
19 was a period of time Mr. Young asked you about where there
20 were expressions of beliefs or writings or research done by
21 Mr. Harte. And you made a distinction between thought and
22 actions, correct?

23 A Yes.

24 Q With the actions being more important for your

1 conclusions?

2 A Yes.

3 Q Is it fair to say it is difficult to sustain a false
4 front to the world over a long period of time or more
5 difficult to do it over a long period of time?

6 A It is. And we see this in psychiatry. If we
7 observe somebody for a long period of time, we become much
8 more confident in our assessment than in a short period of
9 time. That is one of the reasons that I think this 14 years is
10 especially significant, because it is just a long period of
11 time for someone to maintain the behavioral record that he has
12 but also to develop relationships over that period of time.

13 Q You advised Mr. Young you are not aware of the
14 specific conditions Mr. Harte is experiencing each day at the
15 Department of Corrections. But is it fair to say he's subject
16 to observation every minute of every day?

17 A I believe that if he isn't in a locked room, he's
18 under direct observation, yes.

19 Q So you didn't get to see him over those fourteen
20 years but you have access to records from people who did?

21 A Yes.

22 MS. PUSICH: Thank you. Thank you, Your Honor.

23 THE COURT: Anything further.

24 MR. YOUNG: Just a couple of questions.

1 RE CROSS-EXAMINATION

2 BY MR. YOUNG:

3 Q You testified diagnoses may change over time?

4 A Yes.

5 Q And so your diagnoses or diagnosis in 2014 of
6 Mr. Harte differs from the 2002 diagnoses of Dr. Bitker and
7 Moriardi?

8 A Yes.

9 Q Mainly that their diagnoses of personality disorder
10 you no longer find to be present?

11 A Yes.

12 Q Okay. With that, there may be a different diagnosis
13 in another 12 years?

14 A There could be.

15 Q Just the last little part you were testifying with
16 Ms. Pusich there about your confidence Mr. Harte is being
17 accurate with you, straight with you during your analysis, you
18 said if we observe someone for a long time we are more
19 confident in our analysis?

20 A Correct.

21 Q I understand you reviewed some prison records,
22 right?

23 A Yes.

24 Q Showing Mr. Harte over the last 14 plus years?

1 A Yes.

2 Q But your personal observation of Mr. Harte was
3 limited to one meeting?

4 A I was referring to the extended period of
5 observation in the prison not my one meeting, yes.

6 Q I understand. Your meeting was one time?

7 A Yes.

8 Q For how long are we talking?

9 A About 90 minutes.

10 Q So an hour and a half?

11 A Yes. And with what is contained in the prison
12 records.

13 Q As a preface, what is contained in the prison
14 records, you don't know what actions or inactions or
15 disciplinary measures or otherwise has to be triggered to put
16 anything in those records, correct?

17 A I made an assumption it was a complete file. That
18 would include all disciplinary and medical records as well as
19 the request for books and so forth. I made the assumption it
20 was a complete file.

21 Q So you don't know if somebody -- what leads to, if I
22 am asking my question correctly, what triggers somebody from
23 putting any sort of disciplinary action in there or request
24 for books. That would be up to the prison?

1 A That would be.

2 MR. YOUNG: That's all. Thank you, Doctor.

3 MS. PUSICH: Court's indulgence, Your Honor.

4 THE COURT: Okay.

5

6 REDIRECT EXAMINATION

7 BY MS. PUSICH:

8 Q Doctor Piasecki, the prison records you were
9 provided were actually given to me by the District Attorney's
10 Office. But in those documents, is it fair to say it is about
11 two and a half, three inches thick?

12 A You know, I had it electronically. It was several
13 hundred pages.

14 Q The vast majority is requests for reading material?

15 A Yes.

16 Q But included in there is a write-up with respect to
17 a verbal disagreement?

18 A Correct, yes.

19 Q So would you expect that if the prison includes
20 information about a verbal disagreement, they would also
21 include any incidents of violence?

22 A Not only because it appears the verbal agreement was
23 within the threshold, I have looked at many, many files from
24 many, many inmates at Ely and other places, and I have seen the

1 kind of behaviors that happen in these environments. And
2 there is many kinds of bad behaviors that people have in these
3 environments. And so I know what kind of things could have
4 been in there and they were not. The only disciplinary issue
5 that I saw was the phone issue and some of the appeals,
6 exchanges following that.

7 MS. PUSICH: Thank you very much.

8 MR. YOUNG: Nothing. Thank you, Your Honor.

9 THE COURT: May this witness be excused?

10 MS. PUSICH: Yes, Your Honor.

11 THE COURT: Ma'am, you may step down. You are
12 excused.

13 THE WITNESS: Thank you.

14 (Witness excused)

15 MS. PUSICH: Your Honor, may we have a moment to
16 review the exhibit list?

17 THE COURT: Certainly.

18 MS. PUSICH: The defense rests, Your Honor.

19 THE COURT: Counsel.

20 MR. YOUNG: Your Honor, the State has no rebuttal
21 case, however, pursuant to statute, the State would ask that
22 the family of John Castro be allowed to address the jury.

23 THE COURT: Okay.

24 MR. YOUNG: In that regard, the State would call

1 Tony Castro.

2 THE COURT: I am sorry, it is almost 3:00 o'clock.
3 Should we take a short recess first?

4 MR. YOUNG: Whatever the Court's preference.

5 THE COURT: The clerk reminded me maybe it is a good
6 idea to take a short recess before we start with them.

7 During this break, remember until the trial is over
8 you are not to discuss the case with anyone else, other family
9 members or anyone else.

10 You may not allow anyone to speak of the case to
11 you, this includes discussing the case through internet chat
12 rooms, internet bulletin boards, Facebook, tweets, e-mails or
13 text messaging. If any one tries to communicate with you,
14 please report it to me immediately.

15 Do not read, watch, listen to or view any news media
16 accounts or any other accounts regarding the trial or anyone
17 associated with it including any online information. Do not
18 do any research such as including dictionaries, searching the
19 internet or any investigation into the case or the parties at
20 all.

21 Go ahead and go in the jury room. We'll take a
22 short recess. Court's in recess.

23 (Short recess taken.)

24 THE COURT: Thank you. Please be seated. Are we

1 ready to proceed?

2 MR. YOUNG: Yes, Your Honor.

3 THE COURT: Go ahead and bring in the jury. Counsel,
4 will you stipulate to the presence of the jury?

5 MR. YOUNG: State would.

6 MS. PUSICH: Yes, Your Honor.

7 THE COURT: Thank you. Please be seated.

8 Mr. Young.

9 MR. YOUNG: State would call Tony Castro, Your
10 Honor.

11 THE COURT: Thank you. You may proceed.

12

13 ANTHONY M. CASTRO

14 called as a witness, having been first duly sworn,
15 took the witness stand and testified as follows:

16

17 DIRECT EXAMINATION

18 BY MR. YOUNG:

19 Q Good afternoon, sir?

20 A Good afternoon.

21 Q Would you state your name for the record and spell
22 both your first and last name?

23 A Anthony M. Castro. A-N-T-H-O-N-Y. Middle initial M.
24 C-A-S-T-R-O.

1 Q Sir, do you know an individual by the name of John
2 Castro, Jr.?

3 A Yes. He was my oldest brother.

4 Q Now do you have another brother?

5 A Yes, Ronald Castro.

6 Q You said John is your older brother. Who is the
7 oldest of the three?

8 A John.

9 Q Between you and Ron and John?

10 A I have a sister, Laverne.

11 Q In preparation of this hearing, did you prepare, you
12 collectively with the family, prepare a letter to read to the
13 jury?

14 A Yes, I did.

15 Q Before we get to that, I have a few questions for
16 you, sir. Can you tell the jury what yours and John's and your
17 other brother and sister, mother and father's names are?

18 A I am sorry.

19 Q Your mom and Dad's name is what?

20 A John, Sr. And Loretta.

21 Q Going back to 1997 were both your father and mother
22 alive?

23 A Yes.

24 Q Has your father since passed?

1 A Yes, he was.

2 Q Your mother is still alive?

3 A Yes, she is.

4 Q How old is she?

5 A Eighty-three.

6 Q Eighty-three today?

7 A Yes.

8 Q You, sir, are you married yourself?

9 A Yes, I am.

10 Q What s your wife's name?

11 A Cindy Castro.

12 Q And were you and Cindy married back in 1997?

13 A Yes, we were.

14 Q Now you mentioned your brothers. Ronald and Cindy,

15 both of them are in the courtroom as well?

16 A Yes, they are.

17 Q If I could have Ronald and Cindy stand up. Thank

18 you. Have all three of you been present throughout the

19 entirety of this hearing this week?

20 A Yes, we have.

21 Q I am going to take you back to 19, I guess '99 when

22 the trial of Mr. Harte and Ms. Babb and Mr. Sirex was

23 conducted. Were you here for the trial as well?

24 A Yes, I was.

1 Q Do you know a young man by the name of Keoni?

2 A Yes, I do.

3 Q For the reporter, could you spell Keoni?

4 A K-E-O-N-I.

5 Q Who is Keoni?

6 A Keoni was my brother John's son.

7 Q Do you know how old Keoni was at the time John was
8 murdered?

9 A Two months old.

10 Q And who ended up taking care of Keoni?

11 A Cindy and I, my wife.

12 Q He came to live with you?

13 A Came to live us at seven months old.

14 Q Is Keoni still living with you today?

15 A Yes, he is.

16 Q How old is Keoni today?

17 A Seventeen.

18 Q And can you tell the jury just a little bit about
19 Keoni?

20 A Keoni is a wonderful young man. We are blessed to
21 have him with us. He's an athlete like his father. He plays
22 football, baseball, basketball. And he's just one of those
23 exceptional young men. He just does everything we ask. We
24 have been blessed to have him, be able to raise him for my

1 brother.

2 Q If I could approach, Your Honor, I am showing you
3 59-a and b, sir. Take a look at those. Do you recognize
4 those pictures?

5 A Yes, I do.

6 Q Are those both of Keoni?

7 A Yes, it is.

8 MR. YOUNG: Your Honor, I move for 59-a and b.

9 THE COURT: Any objection?

10 MS. PUSICH: No, Your Honor.

11 THE COURT: Exhibit 59-a and 59-b are admitted.

12 (Exhibits 59-a and 59-b admitted in evidence.)

13 BY MR. YOUNG:

14 Q This is 59-a, sir. Is that a picture of Keoni?

15 A Yes, it is.

16 Q How old is he there?

17 A Approximately seven months old.

18 Q About the time he came to live with you and Cindy?

19 A Yes.

20 Q Now I am going to show you 59-b. A picture of Keoni?

21 A Yes.

22 Q He is holding a football and wearing a jersey. Does
23 he play football?

24 A Yes, he does.

1 Q Now did John Castro Jr., have any other children?

2 A Yes, he did.

3 Q Do you know how many?

4 A He had five.

5 Q Your letter gets into kind of the impact his death
6 had on Keoni, correct?

7 A Yes.

8 Q You mentioned in your letter another son named
9 Christopher?

10 A Yes.

11 Q Collectively, what has John Castro, Jr.'s death had
12 impact wise on his children, do you know?

13 A The family structure has fallen.

14 Q Yesterday when Mr. Harte was testifying you heard
15 all that, correct?

16 A Yes, I did.

17 Q And did you hear him when he offered an apology to
18 you and your family?

19 A Yes, I did.

20 Q Up until that testimony yesterday, had you ever
21 received an apology from Mr. Harte?

22 A No.

23 Q Did you hear Mr. Harte testify something along the
24 lines that you or the family had made a post or something

1 similar stating that you did not want Mr. Harte to contact
2 you?

3 A I believe that that never happened.

4 Q You heard him testify to that, though?

5 A Yes, I did.

6 MR. YOUNG: If I could approach.

7 THE COURT: You may.

8 BY MR. YOUNG:

9 Q I am going to show you 58-a, excuse me, 58-a and
10 58-b. Again, do you recognize those pictures?

11 A Yes, I do.

12 Q Are those of John Castro Jr.?

13 A Yes, it is.

14 MR. YOUNG: Move for 58-a and 58-b.

15 THE COURT: Any objection?

16 MS. PUSICH: No, Your Honor.

17 THE COURT: Exhibit 58-a and 58-b are admitted.

18 (Exhibit 58-a and 58-b admitted in evidence.)

19 BY MR. YOUNG:

20 Q Show you first 58-a sir. Could you give the jury
21 some content as to that picture, please?

22 A That was at my parent's house for Christmas.

23 Q Do you know either the approximate year or
24 approximately how old John Castro was in that picture?

1 A I don't recall. It has been so long.

2 Q And show you 58-b. Can you see that, sir?

3 A Yes.

4 Q Again, could you give some context to that as well?

5 A That's my brother, John. He had just got out of
6 Boot Camp and he was waiting for his orders to go to Vietnam.

7 Q What branch of the military did John Castro serve?

8 A He was in the Army.

9 Q Was he proud to be in the Army?

10 A Absolutely.

11 Q Sir, I asked you about a letter. Can I see that,
12 briefly? Thank you. Would you like to read that letter to the
13 jury, sir?

14 A Yes, I would.

15 Q Go ahead, please?

16 A "Your Honor and members of the jury: It's been
17 approximately 17 years since our brother's murder, and yet it
18 seems as if it was yesterday. When I received the phone call
19 that my brother had been shot, I could not comprehend what had
20 happened. Till this day, my family struggles with this. My
21 father told my brother and I to see that the responsible pay
22 for the wrongdoing. Since then, my father has passed away,
23 and we keep all the hearings from my mom to protect her as
24 she's now eighty-three years old, and she calls and asks me if

1 the responsible ones are still in prison. I tell her yes. She
2 fears if they get out they could kill again.

3 My brother was a good man. He served in the Army
4 and was in Viet Nam and had been in heated battles there but
5 lived through it. He was in some pretty rough situations
6 there and survived, only to come to his own country he fought
7 to protect to be murdered by an American on our own land. It
8 sickens us the way Shawn Harte took his life for \$87 and went
9 to a Taco Bell and casino and played slot machines. At the
10 trial, the defendant, Latisha Babb, tried to use sympathy for
11 herself in that she was sorry for what they did, but Shawn
12 Harte did not show any remorse or offer anything to the
13 family. I do believe if he did not get caught, he would have
14 killed again. He had tried prior to killing my brother, but
15 was unsuccessful with a freeway shooting.

16 Shawn Harte is a murderer and he should never be
17 released for any reason.

18 During the trial, I sat and watched his actions and
19 he was laughing and smiling and passed notes to Latisha Babb
20 as if nothing even happened. They even at one break point
21 stood up and hugged each other in front of us all. That
22 sickened me and my family. One of the comments he wrote in a
23 letter to his ex-girl friend who turned it over to the D.A.
24 was shooting my brother was as easy as taking out the trash.

1 My brother is not trash. My brother may not have been perfect,
2 but he was not trash.

3 My wife and I had the opportunity to take my
4 brother, John's, two month old son at the time of his murder
5 and raise him. His name is Keoni. We felt very bad Keoni
6 would only know his father through pictures and what I could
7 tell him. We were pleased with Keoni when he came to us. We
8 have raised him as our own which in our heart he's our child.
9 We have enjoyed watching Keoni grow and play sports as his
10 father did in his younger days. Keoni is a Hawaiian name which
11 means John, who he was named after. John has a son at the age
12 of eight at that time. His name is Christopher. Christopher
13 has had a very troubled life after the murder of his father. I
14 really feel it would have been different if John was still
15 alive. Maybe not perfect, but better, as John loved his kids.
16 We did not tell Keoni about his father until he was fifteen. I
17 mean how do you tell your child, how do you tell your child,
18 one, that he is not yours biologically, but his father was
19 murdered? When we told Keoni his father was murdered and
20 robbed, he said why? I told him I did not have the answer but
21 the people that did this had been caught and are in prison.
22 He asked if they would ever get out. He cried because he said
23 he would never get to know his father. Keoni knows we are his
24 parents now and forever and my wife and I told Keoni we will

1 always be there for him and we'll see Shawn Harte, Latisha
2 Babb, Weston Sirex that did this will hopefully remain in jail
3 for the rest of their lives.

4 I guess what my family doesn't understand is why
5 would he be able to be a free man again. Why does he have the
6 right to anything when he took my brother's life, another
7 human being for absolutely no reason. Shawn Harte took a life,
8 a son, a brother, a father and an uncle and a friend and a man
9 who fought for his country that Shawn Harte also fought for
10 and lives in. Freedom is about choices, and Shawn Harte gave
11 up his freedom when he made the choice to put the gun to my
12 brother's head and pull the trigger and take my brother, John
13 Castro, Jr.'s life. Shawn Harte should have no rights and
14 should never get out. This letter comes from the whole Castro
15 family, all of John's loved ones.

16 In closing, I would like to say I am a retired
17 deputy sheriff, and I do believe in due justice. In March of
18 1999 the Court found Shawn Harte to be guilty of murder.
19 Murder is murder. And you should receive the maximum penalty,
20 especially when it is done willfully and without remorse. He
21 should receive the harshest sentence which should be never to
22 get out. He should die within the prison walls. Because
23 Shawn Harte is hoping to get a lighter sentence for what he
24 did shows he has no remorse. Does he think the years -- does

1 he think the years he has served should be enough? Well the
2 years we cannot get back with my brother outweighs his wants,
3 his rights. My brother had the right to live, the right to
4 raise his children, the right to be there when his father
5 died. But that was taken away. So why should Shawn Harte have
6 the right to try for a lighter sentence to get out possibly
7 and make a life for himself. As the Castro family, we feel he
8 doesn't have that right to get out today, tomorrow or forever.

9 Q Two follow-up questions: You mentioned that you are
10 a retired deputy sheriff?

11 A Yes, I am.

12 Q You didn't work for the County Sheriff's Office?

13 A No, Shasta County.

14 Q In California?

15 A California.

16 Q My last question will be open-ended to you, sir. Is
17 there anything else you would like to share with this jury
18 about your brother or your thoughts on Shawn Harte?

19 A In the last 17 years he talks about him being in
20 there and how tough it has been. Well how about my family?
21 The suffering that my parents had seeing their first child
22 murdered. When he was laying on the bed at the hospital brain
23 dead because of the shot that you gave him to the head, my
24 parents wept and cried and they couldn't understand it. And I

1 to this day don't understand it. And I had my moment with my
2 brother when I was saying goodbye with him laying there dead,
3 brain dead because of your actions. And when I talked to my
4 brother, I told him the things about life that we had shared
5 and the fun as we grew up that we won't have anymore. A tear
6 came up from his eye. And how did that affect me now for
7 those 17 years that you have done to our family? No one
8 understands why this was done. Only you and why you pulled
9 that trigger. And I will take it to my death bed when I die
10 with that question, why, and I will never have that answer.
11 And no one should be able in their life to experience this
12 type of situation, because everybody suffers. My family has
13 suffered hard for those last seventeen years, and we will
14 continue to suffer throughout our life until we are all gone.
15 But my son and someone else will be here if he ever tries
16 another trial. I am sorry for being emotional, but my family
17 has been disrupted like this that I feel I have to stand up
18 and be the man that I am and speak for my family.

19 Thank you, Your Honor. And thank you.

20 MR. YOUNG: Thank you, sir.

21 THE COURT: Any questions?

22 MS. PUSICH: No.

23 THE COURT: Thank you, sir.

24 (Witness Excused.)

1 MR. YOUNG: Your Honor, that is the extent of the
2 statement. Thank you.

3 THE COURT: Ladies and gentlemen of the jury, that
4 concludes the evidence we are going to hear in this case.
5 Because of the hour, it is really too late for you to begin
6 deliberating, because there are some things that have to
7 happen. The attorneys have to meet with me and have to finish
8 the Instructions I am going to read to you about what the law
9 is that you can apply in this case, and then the attorneys
10 will make their closing arguments. After they have made their
11 closing argument, you will begin to deliberate, but it has to
12 be after that. So we are going to take our weekend recess, and
13 you are going to come back on Monday morning. Monday morning
14 you will receive the law that applies to this case and you
15 will hear closing argument from counsel, and then you will
16 begin deliberating as to what your penalty verdict will be.

17 So as you go about your business this weekend, there
18 is something I am going to remind you about not doing, but I
19 also want you to make sure you make arrangements for Monday,
20 because you won't be probably going to lunch on Monday. So
21 you will come at 9:00 o'clock Monday and probably just stay
22 with me. We will feed you, but you won't be going out to
23 lunch. So you should just make arrangements with your family
24 and let them know. And once you begin deliberating, you won't

1 have any communications with anyone until you reach your
2 verdict, if you can reach it that evening. If not, we'll
3 take a break and continue the next day. But that is sort of
4 the schedule, so you know what to look for, what is going to
5 happen for next week.

6 Now you have gotten this admonition from me at every
7 break and you probably know it by heart. This weekend it is
8 even more important, because it is not proper for you to reach
9 any conclusion about the ultimate outcome of this case. You
10 cannot do that, and you can't think about what your ultimate
11 conclusion is going to be until you have heard the law, you
12 have heard closing argument and then you begin talking about
13 the case with your fellow jurors. Since you can't talk to your
14 fellow jurors this weekend until this case is finished and
15 given to you to deliberate, you may not speak of the case to
16 anyone else or allow anyone else to talk to you about the
17 case. You are going to have to think about other things. And
18 I know it is not the easiest thing to do, but if you are
19 thinking about it, keep it to yourself and don't form any
20 solid determinations that you can't get rid of once you hear
21 what the law is and closing arguments.

22 I am going to read the admonition to you again
23 before you leave, but we'll let you leave now and you will
24 come back at 9:00 o'clock Monday morning. Does anyone have

1 any questions about what is going to happen?

2 During this recess that we are about to take,
3 remember that until the trial is over, you may not discuss the
4 case with anyone including your fellow jurors, members of your
5 family, people involved in the trial or any one else. And do
6 not allow anyone to speak of the case to you. This includes
7 discussing the case on the internet or in internet chat rooms
8 or through internet blogs, bulletin boards such as Facebook or
9 twitter, e-mails or text messaging.

10 As I read that list, I wonder is there something I
11 am leaving out. So if I have left it out, you have to
12 complete it. If you anyone tries to communicate with you
13 about this case, please notify the Court immediately. Do not
14 read, watch, listen to or view any news media accounts
15 regarding this case or any other account regarding the trial
16 or anyone associated with the trial including any online
17 information.

18 Do not do any research such as consulting
19 dictionaries, searching the internet or using any other
20 reference materials, and do not make any investigation into
21 the facts and circumstances or the persons involved in this
22 case.

23 I will see you back on Monday morning. Have a nice
24 weekend.

1 Please be seated. We have some business to get to so
2 I want to ask you a couple of questions. Are you ready to
3 talk about Instructions?

4 MS. PUSICH: Yes, Your Honor.

5 MR. YOUNG: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. YOUNG: Just one moment.

8 THE COURT: Sure. Go ahead.

9 MR. YOUNG: Thank you, Your Honor.

10 THE COURT: Why don't we make a record. I think the
11 clerk marked an exhibit while we were on recess.

12 THE CLERK: Exhibit 69 marked.

13 (Exhibit 69 marked for identification.)

14 MS. PUSICH: Exhibit 69 is a copy of Dr. Piasecki's
15 report. We think it is important to be part of the record.
16 It is not offered in evidence for the jury. The State agreed
17 I could do that even though I rested, because it is not going
18 to the jury.

19 THE COURT: Was this disclosed?

20 MS. PUSICH: It was disclosed. We simply want it to
21 be part of the record moving forward. We don't know what is
22 going to happen.

23 THE COURT: Okay. All right. It just will be noted
24 it was marked during the course of the trial just not

1 admitted.

2 MS. PUSICH: Correct.

3 THE COURT: Okay. Ms. Clerk, will you go through,
4 and start with the exhibits and just read the exhibits you
5 believe have been admitted and see if anyone disagrees with
6 this list as she reads it.

7 THE CLERK: Exhibit 1-b and 1-c. 2-a and 2-b, 2-c.
8 3-a and b. 4-a through c. 5-a through b. I am sorry, through
9 d. So that is 5-a, b, c, and d. 7-a through c. 7-d and e. 8-d.
10 9, 11-d, 16, 16-a, 17-a, 17-b, 17-c, 17-d, 7-e, 18-a, 18-b,
11 18-c, 24, 26, 28, 33, 34-a through 1, 35, 36, 38, 38-a, 44-a,
12 52, 53-a, 54-a. 55, 56, 57 are admitted but will not go to
13 the jury. They are demonstrative. 58, 58-a, 59-a, 59-b, 60-a
14 through c. 61, 62, 63, 64, 65, 66 and 68. 69 is not admitted.

15 THE COURT: Okay. Any corrections to make to that
16 list?

17 MS. PUSICH: No, Your Honor.

18 MR. YOUNG: No. Your Honor.

19 THE COURT: Okay. The dilemma of the exhibits you
20 are using were admitted in the other trial, the admitted stamp
21 shows the date that they were admitted which is 1996. Some are
22 ready to come off the document in some respect. Normally,
23 well actually we don't know normally because we have never
24 retried a case in Department 4., Ms. Stone and I. So we don't

1 know what you want to do, because we are concerned about the
2 record for Ms. Babb and Mr. Sirex. I don't think we are going
3 to be trying that case again, knock on wood. But we are not
4 sure about these things. We just want to make a record. Do
5 you want the clerk to put another admitted stamp with today's
6 date over it or leave the old admitted stamps?

7 MS. PUSICH: I think we should leave the old
8 admitted stamps. In the circumstances where they are falling
9 off, I don't object to the Court replacing them with one with
10 the same date that takes place with the one falling off. I
11 don't think we should cover the old one. This jury knows this
12 is a 1997 case. They have heard there has been a previous
13 trial. I don't think that is a surprise to them. I think
14 maintaining the record you have is important.

15 THE COURT: Do you want us to put a new admitted
16 stamp just on a piece of paper, another admitted stamp that
17 says admitted today?

18 MS. BOND: I don't think it is necessary because the
19 record is very clear both in the transcript when things were
20 admitted and in the clerk's record. And we have all just
21 confirmed those items that were admitted at some time during
22 this hearing, so I don't think we need an admitted stamp.

23 THE COURT: Mr. Young?

24 MR. YOUNG: I don't think it is necessary. Would

1 the Court's intention just be on those admitted for this
2 hearing to put a separate admitted stamp with today's date
3 next to the other sticker?

4 THE COURT: That is what we are talking about. I
5 think Ms. Bond and Ms. Pusich say they don't think we even
6 need to do that. We can do that.

7 MR. YOUNG: I don't think it is necessary. I would
8 probably suggest we do that just so if any document that has
9 two exhibit stamps on it, it will be obvious one was used in
10 the trial and one was used here. I agree with Ms. Pusich, I
11 certainly would not cover up any of the trial exhibit dates
12 with our dates here.

13 THE CLERK: The old admitted stamps have all three
14 names on them whereas this will only have Shawn Harte's name.
15 That will also make it clear. The others will have all three
16 names on them.

17 MS. BOND: We have no objection to both being on it.
18 I just didn't think it was necessary. We have no objection to
19 putting it there.

20 THE COURT: Okay. That is way the clerk will handle
21 the exhibits.

22 MR. YOUNG: Thank you.

23 THE COURT: Okay. I think that satisfies those
24 issues. Let's talk about Jury Instructions. The record

1 should reflect, of course, we are convened outside the
2 presence of the jury. Mr. Harte is present, and the purpose
3 of this hearing is to settle the Instructions. I have been
4 given a packet of Instructions from each of you. I think we
5 have corrected the typographical errors, maybe not all of
6 them. If there is more you found, let us know and we can go
7 through these and determine if this packet will work. They
8 are tentatively numbered but not finally numbered.

9 One was it is my duty as the Judge.

10 Two is if in these Instructions.

11 Three, all the evidence presented.

12 Four, certain transcripts of prior witness
13 testimony.

14 Five, certain things are not evidence.

15 Six, you are the exclusive judges of the
16 credibility.

17 Seven is an Instruction that was specifically
18 requested by the defense. It starts, in considering the
19 testimony.

20 Eight, a person is qualified to testify as an
21 expert.

22 Nine, the defendant in this case has been previously
23 found beyond a reasonable doubt by a jury verdict to be guilty
24 of murder in the first degree.

1 Ten, a prison term of fifty years with eligibility.

2 Eleven, any person who uses a firearm or other
3 deadly weapon. And this Instruction specifically at the end,
4 the credit, I think counsel has told me they both agree, tell
5 me if you do, that credit time served goes to the murder of
6 first degree.

7 MS. PUSICH: Your Honor, if he is given an
8 opportunity for parole, that is true. If not, it is kind of
9 academic. It definitely is not being applied to the deadly
10 weapon which is the consecutive sentence.

11 THE COURT: Okay.

12 Twelve is the Instruction that has one offered I
13 think by the defense on mitigating circumstances.

14 MS. PUSICH: Yes, Your Honor.

15 THE COURT: Is that correct?

16 MS. PUSICH: It is.

17 THE COURT: Thirteen, you are provided information
18 through a letter of William Castillo.

19 Fourteen, you have heard evidence the defendant shot
20 a vehicle. This is the Instruction that was written
21 originally by I think the defense for pre-evidentiary
22 presentation and been modified to be included in the packet of
23 Instructions.

24 MS. PUSICH: Correct.

1 THE COURT: It includes all the other act evidence;
2 is that correct?

3 MS. PUSICH: It is.

4 THE COURT: Fifteen, in reaching your verdict. I
5 think there was a discussion about State vs. Flanagan in the
6 discussion of this Instruction.

7 MS. PUSICH: Your Honor, this was briefed and argued
8 by both parties pretrial or pre-hearing. In light of your
9 ruling that the information regarding the sentence could be
10 presented, we don't object to this Instruction, but we are not
11 withdrawing our earlier arguments.

12 THE COURT: You are specifically asking for this
13 Instructions in light of my decision?

14 MS. PUSICH: In light of the ruling, yes.

15 MR. YOUNG: The only thing to add, Your Honor, is
16 this Instruction was actually drafted by the defense. The
17 offered Instruction by the State in regards to the limit that
18 the jury can consider Ms. Babb's and Mr. Sirex' sentences was
19 slightly different. I included language I tried to take
20 directly from the Flanagan opinion. Because the Instruction is
21 for the defense benefit, I deferred to some minor word changes
22 that they requested. Some of the words are a little different
23 but the point certainly is the same.

24 THE COURT: The defense knew they were entitled to

1 maybe the exact words that were used in the Flanagan case but
2 chose these words instead?

3 MS. PUSICH: Correct.

4 HE COURT: That was a strategic decision?

5 MS. PUSICH: It is.

6 THE COURT: Sixteen, in your deliberation you may
7 not consider the subject.

8 Seventeen, it is your duty.

9 Eighteen, although you are to consider the evidence.

10 Nineteen, now you will listen to the argument of
11 counsel.

12 MS. PUSICH: Your Honor, nineteen is the one to
13 which we still have a continuing objection to the language at
14 line 8, equal and exact justice. It is actually the words
15 equal and exact we have concerns about. Those words originally
16 come from the 1801 inaugural address of Thomas Jefferson. I
17 think he was quite eloquent, however, I don't think they have
18 a good place in this Instruction and this trial.
19 Traditionally, they have been approved in some earlier Nevada
20 cases that were capital, and frequently they have been
21 presented by the State as a better alternative than an eye for
22 an eye. However, in the current case, our concern is they will
23 be used by the jury to impose an equal sentence on Mr. Harte
24 to his co-defendants. We have had concerns from the inception

1 of the case as the Court knows from the motions that were
2 filed that a jury that was simply told what the others
3 received will decide Mr. Harte should get the same sentence,
4 and that is not the individualized sentencing determination
5 the Constitution affords him. I think this is another
6 circumstance in which the State will use the language to argue
7 this is what they got and this is what you should get and our
8 entire time spent here this week with all of us will be sort
9 of a waste of time. I think they need to sentence Mr. Harte
10 based upon, certainly, the circumstances of the offense which
11 are horrific, but also his own personal circumstances which
12 have vastly improved. Under the circumstances, if we do
13 express to them the sentence should be equal and exact, I
14 think that is exactly what we'll get, but it won't be an
15 individualized sentencing determination.

16 THE COURT: Why do you think if it says it is
17 between the defendant and the State, they would jump to the
18 conclusion that includes the co-defendants that aren't here?

19 MS. PUSICH: Your Honor, I think my experience is
20 that juries do take their Instructions serious. They do pay
21 attention to them. Of course, the Supreme Court indulges a
22 presumption that is the case except in very rare
23 circumstances. I think the language, itself, lends to they
24 should be the same. I don't think that is what we are suppose

1 to be doing.

2 THE COURT: Mr. Lee.

3 MR. LEE: Your Honor, this Instruction has been
4 given as early as I could find in the early 1900's in Nevada.
5 It has been challenged a multitude of times up even until I
6 think 2004 was the last time the Supreme Court, I was unable
7 to find any Supreme Court decision that went with an objection
8 to it. Rather, they said the objections to this are
9 meritless. They haven't done it. The Federal District Court
10 as well found the exact same way in Nevada. For those reasons
11 and for the understanding that it is merely calling attention
12 to both parties to have a fair and equal shot at what we are
13 requesting, for those reasons the language should stay in as
14 is proposed in Instruction nine.

15 THE COURT: If the words equal and exact justice
16 means fair and equal justice between the defendant and the
17 State of Nevada, I suppose we could use that language as much
18 as equal and exact. The concern, the only concern I have is
19 this argument that somehow letting in the co-defendants'
20 penalties could be misunderstood to include being included in
21 this Instruction. I think we have adequately instructed the
22 jury that is a consideration but not controlling and that they
23 have to accept Mr. Harte, individually. I don't think this
24 Instruction would be misleading, but I don't see any 9th

1 Circuit cases that are exactly on point for letting the
2 co-defendants' sentences come in in a case such as this. We
3 have a case that is unique, and we have found only some old
4 Nevada cases that support it. And that Nevada case that
5 supports letting this in did not have the issue of this
6 Instruction, correct, Mr. Lee?

7 MR. LEE: That's correct, Your Honor. Both Leonard
8 and Daniel are the decisions from late '90's and 2000 that
9 approve of this Instruction. But, again, just looking at that
10 language on the last line, it has nothing to do with any other
11 co-defendants and with the issue presented here. Rather the
12 separate Instruction about that I think clarifies that issue
13 for the jury they re not bound by the other co-defendants'
14 sentences. This merely says be fair. Be fair to both sides,
15 and the exact language that has been specifically approved in
16 Nevada.

17 THE COURT: I am going to overrule your objection.

18 MS. PUSICH: Your Honor, if I might just to complete
19 the record. I am sorry. I believe Mr. Lee can correct me if
20 I am wrong, I don't have them in front of me, I believe both
21 Leonard and Daniel were capital where the jury was also given
22 the other Instruction we do not have on aggravators and burden
23 of proof.

24 With respect to equal and exact, if the State's

1 purpose is to instruct the jury they should treat the State
2 and defense fairly, they communicate the same thing by
3 removing the words equal and exact.

4 THE COURT: Perhaps, but I don't think that -- I
5 don't think it is so compelling that we should take it out. I
6 am going to leave the Instruction since it has been approved.

7 Twenty, during deliberation you will have all of the
8 exhibits.

9 And then that is the end. That is the last
10 Instruction. And then we have some verdicts I think that have
11 been redone.

12 MR. YOUNG: Correct. I provided the Court with the
13 initial verdict which had included some discussion of
14 including the firearm enhancement in the verdict. And because
15 there is a separate Instruction in the packet which advises
16 the jury it is the Court's obligation to set sentence on
17 there. The verdict, while saying he's been previously found
18 guilty of murder in the first degree with the use of a deadly
19 weapon, the penalty they are setting is only for the
20 underlying murder conviction not the weapon enhancement.

21 THE COURT: Okay. Ms. Pusich, Ms. Bond, have you had
22 an opportunity to look at the proposed forms of verdict?

23 MS. PUSICH: Your Honor, we have had an opportunity
24 to look at them, and I think, because the Court is giving

1 Instruction eleven that advises them you will in fact impose a
2 like consecutive sentence for the deadly weapon, then that is
3 no way discretionary, and the Verdict forms are appropriate
4 for this proceedings.

5 THE COURT: Okay. I think Instruction eleven is
6 actually, the proposed language was proposed by the defense
7 with regard the Court entering the deadly weapon enhancement
8 and what it meant.

9 MS. PUSICH: Correct, Your Honor, that you have to
10 and you can't change it. It is going to be exactly the same
11 thing whatever the jury gives him.

12 THE COURT: Okay. Are there any other objections
13 that the State has to the proposed packet?

14 MR YOUNG: Not beyond-- No objection. I really
15 don't have anything to supplement the record beyond what has
16 already been discussed on the record.

17 THE COURT: Ms. Pusich?

18 MS. PUSICH: Your Honor, we don't have any
19 objections. We don't have any other Instructions to offer. I
20 will simply note, because I think we may have discussed it in
21 chambers off-the-record, the defense is not objecting to
22 Instruction eighteen, the anti-sympathy Instruction because
23 the court has agreed to give Instruction twelve which is the
24 mitigation Instruction.

1 THE COURT: Okay. That was a strategic decision the
2 defense has made in your client's best interest?

3 MS. PUSICH: Yes, Your Honor..

4 THE COURT: Thank you. Then we have rejected
5 Instructions A and B. They are still part of the record, and
6 those will be considered having been offered by the defense.
7 And then other than that, we have no other Instructions.

8 MS. PUSICH: Your Honor, Mr. Young is asking me
9 about the state of our record on Instruction fourteen, and I
10 think that we did resolve that on the record previously, but
11 just in an abundance of caution, Instruction fourteen is
12 derived from NRS 48.045. As a very a strategic determination,
13 the defense decided we didn't want a laundry list of alleged
14 prior bad acts. We wanted the reference to what came out in
15 the courtroom at length which was Churchill County, and then
16 any other crimes the jury sentenced him for the murder, rather
17 than including a list of fraud and other things that were
18 referenced in his interview and other evidence. So we are
19 agreeing that fourteen should not have that laundry list. It
20 should be given as it is written.

21 THE COURT: It was written by the defense.

22 MS. PUSICH: Correct.

23 THE COURT: Okay. Thank you. Mr. Young, are you
24 comfortable with that?

1 MR. YOUNG: I am fine. I would point out since it
2 is sentencing, 48.045 doesn't directly apply. Certainly the
3 principle behind that is the driving force of this
4 Instruction. So with that, I have no objection to fourteen.

5 THE COURT: Okay. It doesn't directly apply, but it
6 can't be accepted for anything except for what he's being
7 sentenced on which is the murder, and that there is lot of
8 other overriding rules that apply to that.

9 MR. YOUNG: Of course. That is what fourteen I
10 think adequately points out.

11 THE COURT: Okay. All right. So we have a packet of
12 Instructions that has been finalized. We have forms of
13 verdict that have been finalized. The clerk and I -- excuse
14 me for just a moment. I just wanted to confirm we had resolved
15 everything we had been talking about. And so on Monday we
16 will come in and we will bring the jury in. I will read the
17 Jury Instructions, if you agree and stipulate to them being
18 read before closing argument.

19 MS. PUSICH: Please.

20 MR. YOUNG: Yes, Your Honor.

21 THE COURT: And then we will begin closing argument.
22 I know there was some discussion in chambers about the order
23 of closing argument. I gave it a little bit of thought and
24 looking at old cases. I am going to go with my conservative

1 nature. We'll do the closing arguments the way we always do
2 the closing arguments. The State will present their opening
3 and closing and the defense will present their closing
4 argument, and the State will conclude their argument.

5 MS. BOND: Can I make a record since we discussed it
6 off-the-record in chambers?

7 THE COURT: Yes.

8 MS. BOND: The request I made, because this is a
9 sentencing hearing and not a trial where the State has a
10 burden of proof, in fact there were extensive discussions in
11 motion work whether there was a burden or not and ultimately
12 concluded there wasn't. The State argued they didn't have a
13 burden. There was additional discussion. We just finalized
14 some of that with Jury Instruction nineteen, that the whole
15 purpose of this proceeding was to give everybody, to borrow
16 Mr. Lee's word discussing Instruction nineteen, "a fair and
17 equal" shot at what we are requesting. I had requested the
18 order be the State argue and the defense argue and there be no
19 rebuttal by the State because that would be a fair and equal
20 shot for both parties of what they are requesting. Because the
21 State has no burden that the defense doesn't have here,
22 neither side has a specific burden, we both simply have a need
23 to persuade, not, certainly not a burden by any legal
24 standard, that is exactly the same for both parties, they

1 should get to have primacy and recency. They should get two
2 shots certainly isn't fair and equal shots when they get two
3 and we get one and we are sandwiched in the middle. So I ask
4 this Court allow the State to argue its full argument and
5 allow the defense to argue and end the proceedings there and
6 send the jury out. That was based upon the lack of burden,
7 the fact this is not a trial where there is a burden of proof.
8 It is not a capital sentencing hearing where the State also
9 has a burden of proof regarding the aggravators where they
10 have to prove those beyond a reasonable doubt because the
11 burden, so to speak, on both parties is exactly the same and
12 simply a matter of persuasion. The purpose of argument is
13 merely to explain why the request for each party is the one
14 that should be imposed. The fair and equal shot for both
15 parties would be one time each.

16 THE COURT: Mr. Young.

17 MR. YOUNG: To my knowledge there is no case law or
18 statute directly on point. Both Mr. Lee and I have looked to
19 see in such a circumstance, to see if there is anything.
20 Neither were able to find anything directly on point. What I
21 can direct Your Honor to as a threshold issue, just your
22 discretion in structuring a format of all hearings, you
23 certainly have discretion to set up in this case the order as
24 you feel is appropriate. NRS 175.241 entitled Order of Trial.

1 Again, while the State acknowledges this is a sentencing
2 hearing, it effectively has been set up like a trial. We
3 selected a jury. There was opening statements. The State put
4 on its case in chief followed by the defense case in chief.
5 Both parties had an opportunity for rebuttal, surrebuttal
6 respectively, while that was not taken advantage of. We had
7 Jury Instructions, will have Jury Instructions, and subsection
8 five of that 175.141, when the evidence is concluded, unless
9 the case is submitted to the jury on either side or both sides
10 without argument, the District Attorney or other counsel for
11 the State must open and must conclude the argument. And it
12 uses that mandatory language. The only cases I have found,
13 that have been found, are not directly on point here, because
14 they discuss death penalty cases. However, they all say
15 because of the mandatory language in there which is
16 consistent, very similar to the instance we have here, while
17 sentencing of a trial, it says that statute and the mandatory
18 language must control. The only cases, Your Honor, I found,
19 actually Mr. Lee found is Schoems, S-C-H-O-E-M-S vs. State,
20 114 Nevada 981. Again, that was a case where it was murder of
21 the first degree conviction. And while it was a death penalty
22 case, the defendant was sentenced to life without parole. On
23 pinpoint page 989, it talks about that same subsection I was
24 just reading. And while in that paragraph, it later says that

1 subsection five mandates the State argue last during the
2 penalty phase where the death penalty is involved, the first
3 two sentences of that paragraph read NRS 175.1141 subsection
4 five set forth the procedure to follow during a trial. We
5 concur with the State's argument that because the penalty
6 hearing is part of the trial, NRS 175.141 subsection five
7 governs the penalty hearing as well." Then it goes on to say
8 "The District Attorney must open and conclude the argument."
9 That is the closest thing I could find. So given the fact you
10 have discretion in ordering the order of arguments, beyond the
11 argument, the points I have already made, we would ask the
12 State close as well.

13 MS. BOND: The only other matter I would address in
14 response to that is I have looked at the statute he's read.
15 It is accurate as far as what it does say. This is not a
16 trial in context because there is no burden of the State, for
17 the State. They don't have any obligation. Normally, we can
18 say nothing. We could choose to do that here. It would be
19 ineffective assistance of counsel. There would be no point in
20 it. They don't have to prove anything, so this is a penalty
21 hearing akin to that that would be held before the Court in
22 any sentencing. This happens to have a jury deciding it, but
23 there is no relative difference.

24 We had a discussion in chambers about how that

1 typically runs. It is slightly different judge by judge. In
2 this particular district, it seems to be the prevailing
3 practice the defense would argue first, State would argue
4 next. The defense, if they choose, argues after that
5 reversing that order when it is the Court. The only trial we
6 were able to find where it has been a a non-capital penalty
7 hearing to a jury, I believe there was one in Department 7 and
8 one in Department 6, and they split. In one of the cases, I
9 believe Department 7, they argued the way everybody has said,
10 State, defense, State. In the other, they argued the way we
11 requested where it was State defense and end with no rebuttal
12 by the State.

13 THE COURT: We have researched that case. We
14 haven't been able to find where there was a specific order
15 from the court to do that, and that case had five defendants.

16 MS. PUSICH: Three.

17 THE COURT: Three defendants. And so we don't know
18 why the Judge did it. We don't find anything in the minutes
19 of the Court why that happened. We don't know if the
20 prosecutor waived their closing argument. With the
21 personality of the particular prosecutor, that might have
22 been. So I just don't know why he did that.

23 MS. BOND: I don't know either. The minutes don't
24 show why the prosecutor waived final argument. We just know

1 those two occurred. There haven't been any others we could
2 find or think of in the time frame we were looking where it
3 actually went to penalty of a jury where it wasn't capital,
4 where the State didn't have a burden. It would be our
5 position the fair and equal shot, what we are requesting and
6 Mr. Lee said was so important, would be to actually make it
7 fair and equal for the State and the defendant and they both
8 get the same number of arguments.

9 I did propose a potential alternative of the State
10 arguing, defense arguing, State rebuttal argument, defense
11 having surrebuttal. That wouldn't be my preference, but that
12 would result in the fair and equal opportunity to respond to
13 anything made by the other party.

14 THE COURT: I guess since we put it in front of a
15 judge, in my department defense goes first, State responds,
16 and the only think that comes after that is an allocution from
17 the defendant. No more argument. In very rare cases if there
18 is that argument, sometimes the State stands up and does
19 another argument. That is sort of the way it happened here. I
20 don't think that was particularly what you were thinking would
21 be a good idea.

22 MS. BOND: No, I wasn't particularly -- I would love
23 it if we went defense, State, defense. I realize I can't
24 think of any case that has been done in front of a jury.

1 THE COURT: Mr. Harte already testified, so he's not
2 going to make a statement of allocation.

3 MR. BOND: And if he did, they would be able to come
4 back and make the final statement. That is not what anyone
5 contemplated.

6 THE COURT: So that would be the defense argue and
7 the State argue if you argument is we should do what we do
8 before a judge?

9 MS. BOND: That is not what I am arguing. I was
10 merely commenting in a regular sentencing hearing that is in
11 front of Your Honor, it doesn't go State, defense, State, the
12 order that we have been talking about. But in this case,
13 because it is in front of a jury we have gone, State, defense
14 State, defense, all the way through. It would be awkward to
15 if we only have one shot each.

16 THE COURT: Unfortunately or fortunately, I have
17 been practicing law long enough in this district that I
18 remember back in the day where the prosecutor did go first in
19 sentencing, defense got to argue, then the prosecutor
20 finished. Over time, we have shortened that process a lot in
21 our District Court with the utilization of more specific
22 pre-sentence investigation reports. That is sort of the first
23 lobby out there. And we let the defense argue again.
24 Basically, the pre-sentence report is an arm of the position

1 of the State as stated in the pre-sentence report, then we go
2 with the State. It seems like we are doing maybe a different
3 order, but it is just a different way of presenting it. So I
4 really think we still do it in the old order.

5 The other problem I have, this is a trial. Yes, a
6 different jury found the defendant guilty, but it is as though
7 we started the trial after that verdict. And if that had been
8 the case, we would have done defense would argue, the State
9 would argue then the defense. I think it is a trial. I think
10 the rules apply to a trial. And if it isn't a trial, it is
11 somewhat analogous to a motion. I don't think the defense is
12 bringing a motion that the defendant not be sentenced. But
13 the State has brought the motion the defendant be sentenced on
14 the verdict. If it is a motion, they go first and they go
15 last. So it is kind of the normal course.

16 With that in mind, I am going to let it go the
17 regular course. But I know that we are going to have a nice
18 long argument, Ms. Bond. I know you will be able to get
19 plenty of time to do that.

20 MS. BOND: Thank you. So I don't have to interrupt
21 anything on Monday, I would just note our objection to that
22 procedure and continue through so I don't have to object while
23 Mr. Young or Mr. Lee are arguing.

24 THE COURT: Certainly if you find some other

1 persuasion, I will be glad to look at it first thing Monday
2 morning. Otherwise, well do it that way. Okay. Anything else
3 for this evening?

4 MS. PUSICH: No, thank you.

5 MR. YUNG: Nothing from the State, Your Honor.

6 THE COURT: Okay. Thank you. Court is in recess.

7 (Whereupon, the proceedings were concluded.)

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1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)

4 I, Judith Ann Schonlau, Official Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, DO HEREBY CERTIFY:

7 That as such reporter I was present in Department
8 No. 4 of the above-entitled court on Friday, January 30, 2015,
9 at the hour of 1:30 p of said day and that I then and there
10 took verbatim stenotype notes of the proceedings had in the
11 matter of THE STATE OF NEVADA vs. SHAWN RUSSELL HARTE, Case
12 Number CR98-0074.

13 That the foregoing transcript, consisting of pages
14 numbered 1-97 inclusive, is a full, true and correct
15 transcription of my said stenotypy notes, so taken as
16 aforesaid, and is a full, true and correct statement of the
17 proceedings had and testimony given upon the trial of the
18 above-entitled action to the best of my knowledge, skill and
19 ability.

20 DATED: At Reno, Nevada this 18th day of March, 2015.

21
22 /s/ Judith Ann Schonlau
23 JUDITH ANN SCHONLAU CSR #18
24

CERTIFICATE OF SERVICE

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:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Shawn Russell Harte (#61390)
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office