IN THE SUPREME COURT OF THE STATE OF NEVADA

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SHAWN RUSSELL HARTE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 67519

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction and imposition of a prison sentence, following a re-sentencing ordered by this Court. In 1999, appellant Harte and his two co-conspirators stood trial for their role in the murder of cab driver John Castro. All were found guilty. Harte, the one who shot Castro in the head, was sentenced to death. Defendants Babb and Sirex were both sentenced to life without parole. Each of them appealed. Harte appealed but the judgment was affirmed. *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

Harte's first habeas corpus petition was denied, and that was affirmed on appeal. In the interim, this Court decided *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) (holding that the constitution prohibits basing an

aggravating circumstance, in a capital prosecution, on the felony that was used to obtain first-degree murder conviction via a felony murder theory), rehearing denied, 121 Nev. 25, 107 P.3d 1287 (2005). Based on that change in the law, Harte filed another habeas corpus petition. The district court agreed that the conviction was flawed and ordered a new sentencing hearing. This Court affirmed. *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008). After some extensive delays, that new penalty hearing was conducted. At that hearing, as ordered by this Court, the death penalty was no longer available.

Both parties presented evidence and argument and the jury was instructed and imposed a sentence of life without the possibility of parole, and an additional sentence of life without parole for the use of the firearm. The district court imposed an additional term for the charge of robbery with a deadly weapon and this appeal followed.

II. STATEMENT OF THE FACTS

An outline of the facts can be found in the 2000 *Harte* decision, *supra*. As indicated in that summary, Harte and his confederates decided to rob a cab driver. Harte and accomplice Weston Sirex got in a cab driven by John Castro while accomplice Latisha Babb followed but remained in radio communication with Harte and Sirex. While the cab was still moving, on Cold Springs Road, Harte pulled his pistol, put it to the head of the victim and put a bullet in his brain. They stole the cash that the driver had on him. With their haul, they

gambled some and went to Taco Bell for dinner.

III. ARGUMENT

1. The District Court Did Not Abuse its Discretion in Allowing the Jury to Hear of the Sentences Imposed on the Other Participants in the Murder.

Prior to the sentencing hearing, the court considered competing motions concerning the sentences of Babb and Sirex. 1 JA 11, 17. The district court allowed the jury to hear of the sentences of the co-conspirators. 1 JA 48. The evidence was presented without fanfare and there was no further discussion, except that both the court and the prosecutor took pains to point out that the jury was not bound by the decisions of the prior jury. *See* 1 JA 74, 7 JA 946. Still, appellant contends that he is entitled to yet another sentencing hearing because of that ruling. The State disagrees.

In general, the question of the admissibility of evidence in a sentencing hearing is addressed to the discretion of the district court. NRS 175.552. That discretion applies equally in capital sentencing hearings and non-capital cases. *Nunnery v. State*, 127 Nev. __, 263 P.3d 235, 249, n.7 (2011).

There are courts that have ruled that evidence of the sentences imposed on accomplices is absolutely admissible in a sentencing hearing and there are courts that have held that the information is absolutely not admissible. *See Flanagan v. State*, 107 Nev. 243, 248, 810 P.2d 759 (1991)(admissible); *People v. Moore*, 253 P.3d 1153 (Cal. 2011)(evidence is not admissible). Both go too far. The correct ruling is that the district court should exercise its

discretion and consider the risks of misuse of the evidence, the risks of confusion of the issues or undue waste of time and decide whether the information will be helpful to a specific jury in a specific case. That is, the analysis is the same as any other decision about the admission of evidence in any other sentencing hearing.

There are cases in which evidence has the great potential to confuse the jury. The district court considered that when noting that the three defendants were each tried together, with the same evidence, and were each convicted and originally sentenced by the same jury. 1 AA 51. The court noted that there was unequal participation, but that had already been explored. In the defense motion, and the defense response to the State's motion, there was no suggestion that a ruling allowing the evidence would then give rise to the need for any additional explanatory evidence or that the ruling would create the need to inquire further into the original sentences. 1 JA 51.

A decision that is addressed to the discretion of the trial court calls for the trial court to consider that which should be considered, and to ignore that which should be ignored, and then to reach a decision. *Hughes v. State*, 116 Nev. 327, 333, 996 P.2d 890, 894 (2000). In contrast, an abuse of discretion means that the court did not consider that which should be considered, but instead acted arbitrarily or capriciously. An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason.

State v. District Court (*Armstrong*), 127 Nev. ___, 267 P.3d 777, 780 (2011). Here, there is no reason to believe that the decision of the district court was based on prejudice or preference, but instead the decision seems to be based on appropriate considerations. 1 JA 51. Hence, this Court should find no abuse of discretion. Instead, the Court should recognize that the answer can vary with each trial and in each trial the trial court judge will have to consider whether the evidence will be helpful and whether there is an undue risk of misuse of the evidence or of confusion of the issues. *See* NRS 48.035. Here, the district court carefully instructed the jury on the limits of the use of the evidence, and the prosecutor was equally as careful on the subject. 1 AA 74, 7 AA 946. This Court, then, should rule that there was no abuse of discretion and no error in the admission of the evidence.

The basis of appellant's argument that the district court's analysis was flawed, is in the assertion that this should never have been a death penalty case. That is incorrect. The case was properly tried as a death penalty case at the time, as *McConnell* had not yet been decided. It is clear that this case could have been charged as simply a premeditated murder, with robbery as an aggravated circumstance, if the prosecutor had anticipated *McConnell*. The supposition that all of the actors might have received lesser sentences if the death penalty had not been an option is pure speculation based on an incorrect premise. The second incorrect premise is that a death-qualified jury

is more likely to return a harsh sentence. That premise has been rejected in *Buchanon v. Kentucky*, 483 U.S. 402, 107 S.Ct. 1906 (1987). In that case, the Supreme Court noted that a "death-qualified jury" is simply a jury composed of those who are willing to follow the lawful instructions of the Court. Thus, held the Court, even those defendants who do not face the death penalty may not be heard to complain that they had a death-qualified jury. Thus, the argument about the death-qualified jury need not detain this Court.

As this Court has held so many times, the ultimate question is whether the record reveals that the sentence is based solely on impalpable or highly suspect evidence. *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976). Trying a traditional analysis based on relevance is rather difficult in this case because there are no facts at issue in this type of sentencing hearing. *See Nunnery, supra* (weighing of aggravating and mitigating evidence is not susceptible to any standard of proof). Instead, the question of the appropriate sentence is a moral question, calling for entirely subjective evaluations of things like the rehabilitation, punishment, protection of society and other factors. *See Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010). For that reason, instead of inquiring into whether the disputed evidence tends to prove or disprove some fact at issue, the question ought to be whether the sentence is supported solely by impalpable or highly suspect evidence. *Silks, supra*. If the disputed evidence is excluded, then that decision should be affirmed if it

appears that the court properly considered such things as the likelihood of an undue waste of time or confusion of the issues. NRS 48.035. If the evidence is admitted, that should be affirmed unless the sentence is based solely on impalpable or highly suspect evidence. *See Nunnery v. State*, 263 P.3d at 249.

Here, the evidence was admitted and there is no claim that the evidence was unreliable, and certainly no claim that the sentence is based solely on that disputed evidence. Therefore, the judgment should be affirmed.

2. The Court Did Not Abuse its Discretion in Ordering That the Arguments of Counsel Would Follow the Custom of Having the Prosecutor Open the Arguments and Then Respond to the Arguments of Defense Counsel.

The district court ordered that the arguments of counsel at the close of the hearing would have the prosecutor make an argument, and then the defense could make an argument and then the prosecutor could argue in rebuttal. 6 JA 919-20. Appellant Harte now contends that the sentence must be vacated and a new jury empaneled to consider his sentence yet again because no statute or rule of law mandated that approach. The State contends first that there is indeed a statute that mandates that order of the arguments, but that even if there was no statute on the subject it would not be an abuse of discretion and certainly not any sort of prejudicial error.

NRS 175.141 allows the prosecutor to argue and then to respond. The suggestion that it does not apply to a non-capital sentencing hearing, where the jury is to impose the sentence, should be rejected because sentencing is

indeed a stage of the trial. *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978). Even assuming that NRS 175.141 does not apply to the sentencing phase of a non-capital trial, the suggestion that the order of arguments is not mandated by that statute does not mean that it is prohibited. Instead, a trial court has wide discretion in the area of presentation of evidence and arguments. *State v. Harrington*, 9 Nev. 91 (1873); *State v. Stewart*, 9 Nev. 120 (1874). A court can even allow the parties to re-open the trial after both sides have rested, despite the fact that NRS 175.141 does not mention such a deviation. *Williams v. State*, 91 Nev. 533, 539 P.2d 461 (1975). This Court has also recognized that the trial court can impose reasonable time limits, even though there is no mention of time limits in NRS 175.141. *Manley v. State*, 115 Nev. 114, 126, 979 P.2d 703, 710 (1999). The conclusion is that the district court has the discretion to decide the order of arguments. As there is no abuse of discretion if failing to deviate from the customary, this Court should find no error.

On the subject of prejudice, this Court should presume that the jury followed its instructions and made the decision based on the evidence, not the arguments. *Summers v. State*, 122 Nev. 1326, 148 P.3d 778 (2006). Appellant gives no reason to abandon that customary presumption and so the Court should decline to ignore such a fundamental precept. *See Weber v. State*, 121 Nev. 554, 575, 119 P.3d 107, 121 (2005). Thus, this Court should

decline to order another sentencing hearing with arguments presented in a different order.

3. The Sentence Is Lawful.

Appellant Harte next argues that this Court should simply substitute its judgment for that of the twelve representatives of the community (and of the first twelve) who unanimously rejected a lesser sentence. The argument is based on the suggestion that those jurors never got to hear the sentiments expressed in *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989). The premise is incorrect as nothing precluded defense counsel from using the language of that decision. In fact, the arguments of defense largely track that decision.

The State might also note that the defendant in *Naovarath* was thirteen years old at the time of the crime. Harte was an adult, and a veteran, and the law does indeed distinguish between adults and juveniles when it comes to sentencing. *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455 (2012)(prohibiting mandatory sentences of life without parole for juveniles). This Court should recognize that same distinction and hold that *Naovarath* is limited to its unique facts.

This Court has held that the review of a non-capital sentence by a jury is the same as the review of a sentence imposed by a judge: "So long as the record does not demonstrate prejudice resulting from consideration of

information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed." *Mason v. State*, 118 Nev. 554, 562, 51 P.3d 521, 526 (2002). As Harte has not identified any impalpable or highly suspect evidence, and has certainly not shown that the sentence was based solely on that disputed evidence, the judgment should be affirmed.

IV. CONCLUSION

The sentencing hearing included no impalpable or highly suspect evidence and the sentence is within the range allowed by the relevant legislation. Accordingly, the judgment of the Second Judicial District Court should be affirmed.

DATED: September 22, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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

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DATED: September 22, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 22, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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