IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 67519

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

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

The district court should not have allowed evidence of co-defendants' sentences at this sentencing hearing

The State begins with the observation that some courts allow evidence of co-defendant's sentence at a defendant's penalty hearing while other courts do not. Respondent's Answering Brief (RAB) at 3 (citing *Flanagan v. State*, 107 Nev. 243, 248, 810 P.2d 759 (1991) (allowing such evidence) and *People v. Moore*, 253 P.3d 1153 (Cal. 2011) (disallowing such evidence) as representative of existing polar views). In this appeal Mr. Harte specifically requests this Court to revisit and overruled *Flanagan* for the reasons, among others, expressed in Justice Rose's concurrence in that case.[1]

In any event, the State's argument goes like this: this contrary authority either way "go[es] too far." The "correct" approach is make admissibility of this evidence hinge on a district court's discretion

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[1] Mr. Harte would no doubt augment his argument with language from *Moore* if the citation in the State's brief were helpful. That citation—253 P.3d 1152—simply notes that the California Supreme Court granted review but deferred briefing. Later, review was withdrawn and *Moore* was remanded for re-consideration in light of *People v. Aranda*, 55 Cal.4th 342, 283 P.3d 632 (Cal. 2012)—which, like *Moore*, involved reasonable doubt instructions, not the admissibility of a co-defendant's sentence at a penalty hearing.

"consider[ing] the risks of misuse of the evidence, the risks of confusion of the issues or undue waste of time and decid[ing] whether the information will be helpful to a specific jury in a specific case." RAB at 3-4, & 5 (reiterating that "the answer can vary with each trial and ... the trial judge will have to consider whether the evidence will be helpful and whether there is an undue risk of misuse of the evidence od of confusion of the issues."). Respectfully, this suggestion is simply shorthand for the proposition that such evidence will always be *admissible* when offered by the State against a defendant, but *inadmissible* when offered by the defendant in support of a lesser sentence. *Cf. Flanagan v. State*, 107 Nev. 243, 253-54, 810 P.2d 759, 765 (1991) (Rose, J., concurring) (noting that every case cited in his concurring opinion (forbidding the use of such evidence) dealt "with a defendant's attempt to introduce the penalty assessed against other defendants.").

Accepting this as a given, this Court must now be prepared to hold such evidence inadmissible per se in order to keep the sentencing jury's attention confined to consideration of the individual defendant's

character, record, and the circumstances of the offense—as contemplated by Nevada's individualized sentencing scheme.

The State does not address the overruling of *Flanagan*—as noted, limiting its argument to abuse of judicial discretion. But even under this limited approach the district court erred. The district court erred because the sentences of life-without-the-possibility-of-parole imposed on Mr. Harte's co-defendants were informed by the death penalty imposed on Mr. Harte by *that* same death-qualified jury. *Schoels v. State*, 114 Nev. 981, 992, 966 P.2d 735, 742 (1998) (Springer, J., dissenting) (noting that "death qualified jury" increases the likelihood the jury will return "the next most severe verdict). The net effect of the court's ruling was to place the jury in the awkward position of giving Mr. Harte (the shooter) a sentence less than that received by his co-defendants (both non-shooters). Thus, the result was ordained by the court's ruling; instead of looking to Mr. Harte's personal evolution, growth, and rehabilitation as it occurred overtime, the jury simply placed him in equipoise with his co-defendants, demonstrating that the jury's penalty verdict was prejudicially infected by this evidence.

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The district court should have limited the State to one argument

The State first argues that NRS 175.141 "allows the prosecutor to argue and then respond." RAB at 7. But this statute, by its terms, covers the order of trial, not the order of a penalty hearing. The State next argues that even if NRS 175.141 does not apply, "a trial court has wide discretion in the area of presentation of evidence and arguments." RAB at 8 (noting that a court can impose time reasonable time limits on arguments, and where appropriate can allow the parties to re-open the trial). True enough. However, NRS 175.552(4) does not grant dual sentencing arguments to the State and where, as here, the parties had an equal burden of persuasion it was an abuse of discretion on the part of the trial court place a thumb on the scale by allowing the State two opportunities to argue for a sentence of life without the possibility of parole. *Cf. Patterson v. State*, 129 Nev. Adv. Op. 17, 298 P.3d 433, 439 (2013) (noting that this Court has found an abuse of discretion occurs "whenever a court fails to give due consideration to the issues at hand."). Had the district court judge given due consideration to the issues, it would have—recognizing that a penalty hearing is not a guilt inquiry—limited the parties to one closing argument a piece.

On prejudice

As argued in the opening brief Mr. Harte today is not the Mr. Harte who killed Mr. Castro. The jury's focused consideration of Mr. Harte's personal evolution, growth, and rehabilitation was precluded however, by (1) evidence of the co-defendants' life without sentences and (2) a closing argument structure that tipped in favor of the State. Each of these obstacles was the product of the trial court's rulings. While it may be somewhat speculative as to what sentence the jury would have returned in the absence of these rulings, it seems abundantly clear that Mr. Harte's opportunity for a life sentence with the possibility of parole would have been enhanced without them.

Thus, the prejudice to Mr. Harte is not the sentence he received, but the basis upon which that sentence was reached. The trial court's rulings unduly influenced the jury and in essence directed the jury's penalty decision.

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II. CONCLUSION

Thus, this Court should vacate the sentence of life without the possibility of parole (and its consecutive weapon enhancement) which was imposed below, and remand for a new sentencing hearing where the jury is given the opportunity to consider Mr. Harte's character, the record, and the circumstances of the offense devoid of the undue influence of the co-defendants' sentences, and within a frame work for a fair closing argument by each party.

DATED this 17th day of November 2015.

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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 Century Schoolbook in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,435 words. NRAP 32(a)(7)(A)(i), (ii).

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of November 2015.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of November 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

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