

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE)	Electronically Filed
)	Dec 02 2019 02:52 p.m.
)	Elizabeth A. Brown
)	Clerk of Supreme Court
Appellant,)	Supreme Court No. 78978
)	
v.)	
)	
STATE OF NEVADA,)	
)	
Respondent.)	
	/	

APPELLANT'S OPENING BRIEF

Appeal from an Order Dismissing Petition and Supplemental Petition for Writ of
Habeas Corpus (Post-Conviction) in Case CR98-0074A
The Second Judicial District Court of the State of Nevada, Washoe County
Honorable Connie J. Steinheimer, District Judge

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
3. Law firm appearing in the Court(s) Below:

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DATED this 2nd day of December, 2019.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	v
STATEMENT OF ISSUES PRESENTED FOR REVIEW	v
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT	8
CONCLUSION	18
ROUTING STATEMENT	18
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE.....	20

TABLE OF AUTHORITIES

Federal Cases

<i>Lockett v. Ohio</i> 438 U.S. 586, 98 S.Ct. 2954 (1998).....	11
<i>McMann v. Richardson</i> 397 U.S. 759, 90 S.Ct. 1441 (1970).....	8
<i>Strickland v. Washington</i> 466 U.S. 668, 104 S.Ct. 2052 (1984)	8
<i>United States v. Frady</i> 456 U.S. 152, 102 S.Ct. 1564 (1982).....	9

Nevada Cases

<i>Flannagan v. State</i> 107 Nev. 243, 810 P.2d 759 (1991).....	4, 11
<i>Hargrove v. State</i> 100 Nev. 498 (1984).....	9, 11, 17, 18
<i>Harte v. State</i> 116 Nev. 1054, 13 P.3d 420 (2000).....	1
<i>Harte v. State</i> 132 Nev. 410, 373 P.3d 98 (2016).....	2, 4, 5, 6, 11, 12, 14, 17
<i>Hogan v. Warden</i> 109 Nev. 952, 860 P.2d 710 (1993).....	9
<i>Kirksey v. State</i> 112 Nev. 980, 923 P.2d 1102 (1996).....	8, 9
<i>Lader v. Warden</i> 121 Nev. 682, 120 P.3d 1164 (2005).....	8
<i>Martinez v. State</i> 114 Nev. 735, 961 P.2d 143 (1998).....	11

<i>McConnell v. State</i>	
120 Nev. 1043, 102 P.3d 606 (2004).....	1
<i>State v. District Court (Riker)</i>	
121 Nev. 225, 112 P.3d 1070 (2005).....	9
<i>State v. Harte</i>	
124 Nev. 969, 194 P.3d 1263 (2008).....	1, 10
<i>Warden v. Lyons</i>	
100 Nev. 403, 668 P.2d 504 (1984).....	9

Statutes

NRAP 4.....	vi
NRAP 17.....	18
NRAP 26.1 (a).....	i
NRAP 28.....	19
NRAP 32.....	19
NRS 34.575.....	vi

United States Constitution

Fifth Amendment.....	3, 5, 6, 7, 12, 14, 17
Sixth Amendment.....	3, 5, 6, 7, 12, 14, 17
Eighth Amendment.....	3, 5, 6, 7, 12, 13, 14, 17
Fourteenth Amendment.....	3, 5, 6, 7, 12, 14, 17

JURISDICTIONAL STATEMENT

This is an appeal of the order of the district court below in CR98-0074A dismissing Appellant's Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed and entered on May 15, 2019. Appellant filed a Notice of Appeal on June 10, 2019. This Court has jurisdiction to hear this case pursuant to NRAP 4(b) and NRS 34.575.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should this Court reverse the district court's dismissal of Ground Two of the Petition and Supplemental Petition and Ground Five of the Supplemental Petition because the claims were not presented to the Nevada Supreme Court on direct appeal and therefore not barred under the law of the case doctrine?

2. Should this Court reverse the district court's dismissal of Grounds Three and Four of the Petition and Supplemental Petition, and Ground Six of the Supplemental Petition because Mr. Harte alleged facts that if true would entitle him to relief?

STATEMENT OF THE CASE

This is an appeal from the district court's order dismissing Appellant, Shawn Russell Harte's, Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) entered on May 5, 2019. 7 Joint Appendix (JA) 1096.

In March of 1998, Mr. Harte, along with codefendants Latisha Babb and Weston Sirex, was charged with murder with the use of a deadly weapon and robbery with the use of a firearm. 1JA 0001. On March 19, 1999 Mr. Harte was convicted on both counts. 1JA 0006, 0008. Mr. Harte was sentenced to death on May 7, 1999. 1JA 0009. On direct appeal the Nevada Supreme Court upheld the conviction and death sentence in *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

Several years later the Nevada Supreme Court issued a ruling in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), finding that it is impermissible under the United States and Nevada Constitutions to use the same felony to establish felony murder and as a capital aggravator. *Id.* Mr. Harte filed for post-conviction relief based upon the holding in *McConnel v. State* and, predicated on that holding, the Nevada Supreme Court vacated his death sentence and ordered a new penalty hearing. *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008).

Mr. Harte's new penalty hearing was held January 26-30, and February 2, 2015. See JA Volumes 3 through 5. The jury returned a verdict of life without the possibility of parole. 6JA 0894. On February 2, 2015 Mr. Harte was sentenced to a

term of life without the possibility of parole for murder with a consecutive like term for the use of a deadly weapon, and a concurrent term of 72 to 180 months for robbery with a like consecutive term for use of a firearm. 6A 0895.¹ Subsequently Mr. Harte filed a direct appeal of his conviction in Nevada Supreme Court Case No. 67519. The Nevada Supreme Court affirmed the conviction on June 2, 2016 in *Harte v. State*, 132 Nev. 410, 373 P.3d 98 (2016).

On May 5, 2017, Mr. Harte timely filed a Petition for Writ of Habeas Corpus (Post-Conviction), JA6 0897, and a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on February 1, 2018 (JA6 0907). On March 19, 2018 the State answered the Petition and Supplemental Petition, 6JA 0982, and moved to dismiss the Petition and Supplemental Petition, 6 JA 0985. On April 13, 2018 Mr. Harte opposed the Motion to Dismiss. 6JA 0990. On June 21, 2018 the district court held a hearing on the State's Motion to Dismiss. At the hearing the district court granted the Motion to Dismiss with respect to Grounds Two through Six and ordered additional briefing on Ground One of the Petition and Supplemental Petition. 6JA 0998, 1014-1015. However, after filing a Second Supplemental Petition as to Ground One (7JA 1018), Mr. Harte voluntarily withdrew Ground One in its entirety. 7JA 1087. Thereafter, the district court entered a written order dismissing the

¹ Mr. Harte was given credit for 6,293 days served and ordered to pay fine, fees and assessments. *Id.*

Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).
7JA 1094, 1096.

STATEMENT OF FACTS

The background of this case is well set out in the opening brief filed in Mr. Harte's direct appeal of his 2015 conviction, Nevada Supreme Court Case No. 67519, which is attached to the Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) as Exhibit 1. 6JA 0907, 0971.

A. *Ground Two of the Petition and Supplemental Petition.*²

In Ground Two of the Petition and Supplemental Petition, Mr. Harte alleged he received ineffective assistance of counsel in violation of the United States Constitution, Amendments V, VI, VIII, and XIV. 6JA 0907, 0910:1-3. Specifically, Mr. Harte alleged trial and appellate counsel failed to properly raise and preserve the issue of whether the district court erred in allowing evidence of Mr. Harte's co-defendants sentences, who each received life without the possibility of parole, to be presented to Mr. Harte's second penalty jury. 6JA 0907, 0910-0914.

Prior to the second penalty hearing defense counsel and the prosecutor had submitted motions in *limine* regarding whether the sentences received by Mr. Harte's codefendants in 1999 – life without the possibility of parole – should be told to Mr.

² As set forth in the Opposition to Motion to Dismiss, Mr. Harte is raising all possible claims in this case in order to preserve them for federal habeas review. 6JA 0990:28, 0991:1.

Harte's new penalty jury. *See* 1JA 0011 and 1JA 0017. The district court granted the State's motion and allowed the jury to hear evidence of the codefendants' sentences. 1JA 0046. At the penalty hearing former Washoe County Sheriff Detective Beltron told the jury that in 1999 both codefendants received a sentence of life without the possibility of parole plus a like consecutive sentencing enhancement for the murder. 3JA 0391, 0408, 0440-0442.

The issue of whether the district court erred in admitting evidence of the codefendants sentence was raised on direct appeal. 6JA 0921, 0948. In the Reply to the Opening Brief appellate counsel argued this Court must be prepared to hold that evidence of a codefendant's sentence in another defendant's sentencing hearing must be considered 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 offences. 6JA 907, 963, 968-969. In affirming the district court's decision to admit the evidence, this Court stated, *inter alia*:

Here, Harte asks this court to overrule *Flanagan* and adopt a rule that a district court should never allow evidence of codefendant's sentences. We decline to issue such a rule because each case had unique facts and circumstances. The district court must be given the discretion to determine if such evidence should be admitted.

Harte v. State, 132 Nev. 410, 411, 373 P.3d 98, 101 (2016).

In dismissing ground two of the Petition and Supplemental Petition the district court found the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

B. *Ground Three of the Petition and Supplemental Petition.*

In Ground Three of the Petition and Supplemental Petition, Mr. Harte alleged he received ineffective assistance of counsel in violation of the United States Constitution, Amendments V, VI, VIII, and XIV. 6JA 0907, 0914:25-28. Specifically, Mr. Harte alleged trial and appellate counsel failed to properly raise and preserve the issue of whether his sentence constituted cruel and unusual punishment. *Id.* at 0917:1-2.

On direct appeal Mr. Harte raised a claim that his sentence was excessive given the circumstances of his case. 6JA 0921, 0958. This Court construed this claim as an Eighth Amendment claim and found Mr. Harte's sentence did not amount to cruel and unusual punishment and was within the statutory limits. *Harte v. State*, 132 Nev. 414-415, 101-102. In dismissing ground three of the Petition and Supplemental Petition the district court found the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

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C. *Ground Four of the Petition and Supplemental Petition.*

In Ground Four of the Petition and Supplemental Petition, Mr. Harte alleged he received ineffective assistance of counsel in violation of the United States Constitution, Amendments V, VI, VIII, and XIV because the district court allowed the prosecutor to argue first and last in closing arguments before the penalty jury. 6JA 0907, 0917:6-10. This issue was raised on direct appeal. 6JA 0921, 0955. This Court found the district court did not abuse her discretion in allowing the State to start and conclude the closing arguments. *Harte v. State*, 132 Nev. 413-414, 101. In dismissing Ground Four of the Petition and Supplemental Petition the district court found the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

D. *Ground Five of the Supplemental Petition.*

In Ground Five of the Supplemental Petition, Mr. Harte alleged his sentence was invalid under the United States Constitution, Amendments V, VI, VIII, and XIV, because the trial court failed to instruct the jury properly during the penalty hearing specifically with regard to Jury Instruction No. 15 which pertained to the jury's consideration of the sentences of the codefendants.³ 6JA 0907, 0917:23-28,

³ Jury Instruction No. 15 provided:

In reaching your verdict, you may consider the sentences imposed upon Weston Sirex and Latisha Babb, previously convicted and sentenced for the

0918. This claim was not brought on direct appeal. At the hearing on the State's motion to dismiss the Petition and Supplemental Petition, post-conviction counsel requested that Ground Five be construed as an ineffective assistance of counsel claim. 6JA 0998, 1010:22-24, 1011:1-6. In dismissing Ground Five of the Supplemental Petition the district court ruled the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

E. *Ground Six of the Supplemental Petition.*

In Ground Six of the Supplemental Petition, Mr. Harte alleged his sentence was invalid under the United States Constitution, Amendments V, VI, VIII, and XIV due to the cumulative errors resulting from the gross misconduct of state officials and witnesses and the deprivation of Mr. Harte's right to the effective assistance of counsel. 6JA 0907, 0918:25-27, 0919:1-2. This claim was not raised on direct appeal. In dismissing Ground Six of the Supplemental Petition the district court found there was no cumulative error because Mr. Harte's only surviving claim was ground one of the Petition and Supplemental Petition which he had voluntarily withdrawn. 7JA 1096, 1098:13-15.

murder and robber of John Castro Jr. However, you should impose whatever sentence for Shawn Harte that you feel is appropriate for him.

6JA 0872, 0888.

SUMMARY OF ARGUMENT

The district court erred in dismissing Ground Two of the Petition and Supplemental Petition and Ground Five of the Supplemental Petition under the law of the case doctrine as those grounds alleged facts and issues not addressed on direct appeal. In addition, the district court erred in dismissing Grounds Three and Four of the Petition and Supplemental Petition, and Ground Six of the Supplemental Petition as Mr. Harte alleged facts that if true would entitle him to relief.

ARGUMENT

Standard of Review:

Habeas claims as to questions of law are reviewed *de novo*. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The Sixth Amendment to the United States Constitution guarantees to a defendant the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441 (1970); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1997). On a claim for ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.

2052; *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102 (1996); *Warden v. Lyons*, 100 Nev. 403, 432-33, 668 P.2d 504, 505 (1984). To demonstrate prejudice, the petitioner must show that the claimed errors at trial created a possibility of prejudice and that they worked to his actual and substantial disadvantage. *State v. Dist. Court (Riker)*, 121 Nev. 225, 112 P.3d 1070, 1074-75 (2005) (quoting *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1564 (1982)). See also *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

An evidentiary hearing is warranted if a petitioner's claims are supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

1. The district court erred in dismissing Ground Two of the Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing.

In Ground Two of the Petition and Supplemental Petition, Mr. Harte alleged trial and appellate counsel failed to properly raise and preserve the issue of whether the district court erred in allowing evidence of Mr. Harte's codefendants sentences, who each received life without the possibility of parole, to be presented to Mr. Harte's second penalty jury in 2015. 6JA 0907, 0910-0914. The district court dismissed Ground Two finding it was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

Mr. Harte argues Ground Two is not barred by the law of the case doctrine. Mr. Harte contends appellate counsel was ineffective in arguing that this Court adopt a *per se* rule that the evidence of a codefendant's sentence should never be admissible in a penalty phase hearing.⁴ Mr. Harte contends appellate counsel should have presented the argument as to the particular facts of Mr. Harte's case and whether, under the unique circumstances of his case, evidence of his codefendants sentences should have been admitted at the second penalty hearing some 16 years after the death penalty proceeding conducted jointly over Mr. Harte and his codefendants by a death penalty qualified panel, a proceeding which was overturned by *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008). This Court found the district court did not abuse her discretion in allowing the evidence to be presented to the jury but did not analyze whether, under the particular facts of this case, the evidence was more prejudicial than probative in Mr. Harte's penalty proceeding. Rather, this Court ruled that it would not grant relief on direct appeal by adopting a *per se* rule that evidence of a codefendant's sentence should never be allowed in a penalty phase hearing.⁵ Therefore, Mr. Harte contends Ground Two it is not barred by the law of the case doctrine.

⁴ See 6 JA 907, 963, 968-969.

⁵ As previously set forth, in affirming the district court's decision to admit the evidence, this Court stated, *inter alia*:

Under *Hargrove v. State*, Mr. Harte has alleged facts that, if true, would entitle him to an evidentiary hearing. There is a reasonable probability that had appellate counsel asked this Court to opine on whether evidence of Mr. Harte's codefendants sentences should have been admitted at the second penalty phase hearing under the unique facts of his case, this Court would have concluded the evidence should not have been admitted as it did not shed any light on the circumstances of the offense or the defendant's character background, history or mental condition. Such evidence was irrelevant and only served to prejudice Mr. Harte and negate the individualized sentencing he was entitled to as stated by Nevada Supreme Court Justice Rose in *Flanagan v. State*, 107 Nev. 243, 250-254, 810 P.2d 759, 763-765 (1991), citing to *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2965 (1998).⁶ It is reasonable to conclude the second penalty jury would not have imposed a sentence equal to that of Mr. Harte's codefendants, but a lesser sentence given the evidence

Here, Harte asks this court to overrule *Flanagan* and adopt a rule that a district court should never allow evidence of codefendant's sentences. We decline to issue such a rule because each case had unique facts and circumstances. The district court must be given the discretion to determine if such evidence should be admitted.

Harte v. State, 132 Nev. 410, 411, 373 P.3d 98, 101 (2016).

⁶ See also *Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998) ("The Eighth Amendment requires that defendants be sentenced individually, taking into account the individual, as well as the charged crime.")

of Mr. Harte's circumstances at the time of the murder, his remorse, and his rehabilitation, all presented through his testimony at the second penalty phase hearing. *See* 3JA 0391, 0464-0536, 4JA 0537-0663. Therefore, Mr. Harte argues the district court should not have dismissed Ground Two without holding an evidentiary hearing.

2. The district court erred in dismissing Ground Three of the Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing.

In Ground Three of the Petition and Supplemental Petition, Mr. Harte alleged he received ineffective assistance of counsel in violation of the United States Constitution, Amendments V, VI, VIII, and XIV. 6 JA 0907, 0914:25-28. Specifically, Mr. Harte alleged trial and appellate counsel failed to properly raise and preserve the issue of whether his sentence of life without the possibility of parole constituted cruel and unusual punishment. *Id.* at 0917:1-2. On direct appeal this Court found Mr. Harte's sentence did not amount to cruel and unusual punishment and was within the statutory limits. *Harte v. State*, 132 Nev. 414-415, 101-102. In dismissing ground three of the Petition and Supplemental Petition the district court found the claim was barred under the law of the case doctrine because it had been decided by the Nevada Supreme Court on direct appeal. 7 JA 1096, 1097-1098.

Mr. Harte argues he has alleged facts that if true, would entitle him to relief. Mr. Harte contends that appellate counsel did not properly present this issue to this

Court. Mr. Harte argues this issue should have been presented to this Court as an issue arising under the Eighth Amendment guarantee against cruel and unusual punishment, rather than argue the sentence was simply excessive, and appellate counsel should have analyzed the Eighth Amendment issue in light of Mr. Harte's right to individualized sentencing and the evidence presented to the second penalty jury that Mr. Harte was remorseful and has been rehabilitated. Although this Court decided, *sua sponte*, to analyze Mr. Harte's sentence under the cruel and unusual punishment standard, Mr. Harte contends appellate counsel should have presented a cruel and unusual punishment argument in conjunction with the right to individualized sentencing and the evidence of Mr. Harte's remorse and rehabilitation.

Mr. Harte contends he has alleged facts in Ground Three which, if true, would entitle him to relief. As set forth in the Supplemental Petition, Ground Three was presented in support of Ground Six which alleged cumulative error. 6JA 907, 917:3-5. Therefore, Mr. Harte argues the district court should not have dismissed Ground Three without holding an evidentiary hearing.

3. The district court erred in dismissing Ground Four of the Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing.

In Ground Four of the Petition and Supplemental Petition, Mr. Harte alleged he received ineffective assistance of counsel in violation of the United States

Constitution, Amendments V, VI, VIII, and XIV because the district court allowed the prosecutor to argue first and last in closing arguments before the penalty jury. 6JA 0907, 0917:6-10. On direct appeal this Court found the district court did not abuse her discretion in allowing the State to start and conclude the closing arguments. *Harte v. State*, 132 Nev. 413-414, 101. In dismissing ground four of the Petition and Supplemental Petition the district court found the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7JA 1096, 1097-1098.

Mr. Harte contends he has set forth allegations in Ground Four that would entitle him to relief. As set forth in the Supplemental Petition, Ground Four was presented in support of Ground Six which alleged cumulative error. 6JA 907, 917:21-22. Therefore, Mr. Harte contends the district court should not have dismissed Ground Four without holding an evidentiary hearing.

4. The district court erred in dismissing Ground Five of the Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing.

In Ground Five of the Supplemental Petition, Mr. Harte alleged his sentence was invalid under the United States Constitution, Amendments V, VI, VIII, and XIV, because the trial court failed to instruct the jury properly during the penalty hearing, specifically with regard to Jury Instruct No. 15 pertaining to the jury's consideration of the sentences of the codefendants. 6JA 0907, 0917:23-28, 0918.

This claim was not brought on direct appeal. At the hearing on the State's motion to dismiss, post-conviction counsel requested that Ground Five be construed as an ineffective assistance of counsel claim. 6JA 0998, 1010:22-24, 1011:1-6. In dismissing Ground Five of the Supplemental Petition the district court ruled the claim was barred under the law of the case doctrine because it had been decided by this Court on direct appeal. 7 JA 1096, 1097-1098.

The district court erred in dismissing Ground Five under the law of the case doctrine as the claim was not presented to this Court on direct appeal. Mr. Harte contends he is entitled to an evidentiary hearing on Ground Five.

Jury Instruction No. 15 was intended to address the district court's decision to admit evidence of the codefendants' sentences at Mr. Harte's second penalty hearing. Jury Instruction No. 15 provided:

In reaching your verdict, you may consider the sentences imposed upon Weston Sirex and Latisha Babb, previously convicted and sentenced for the murder and robber of John Castro Jr. However, you should impose whatever sentence for Shawn Harte that you feel is appropriate for him.

6JA 0872, 0888.

On day five of the penalty hearing the district court reviewed the proposed jury instructions with trial counsel. Discussion ensued regarding Jury Instruction No. 15. However, despite the district court's ruling to allow evidence of the codefendants sentences to be presented to the jury, defense counsel agreed to Jury Instruction No. 15 (which defense counsel had drafted). 5JA 0693, 0771-0772. An

earlier instruction, which had been agreed to by defense counsel 4 days prior to commencement of the second penalty phase hearing, had provided:

In reaching your verdict, you may consider sentences imposed upon the defendant's co-defendants, Westin Cyrus [sic] and Leticia [sic] Babbs. However, *you are not bound by those sentences* and should impose whatever sentence for the defendant that you feel is appropriate.

1JA 0052, 0072:22-24, 0073:1-21 (emphasis added).

In Ground Five, Mr. Harte alleged Jury Instruction 15 failed to adequately instruct the jury that they had no obligation to sentence Mr. Harte to an equivalent sentence and did not instruct the jury that they are to consider Mr. Harte's character, record, and circumstances of the offense in sentencing. 6JA 0907, 0917:23-28, 918. In addition, given Instruction No. 19 (6JA 0872, 0892), which instructed the jury to be governed by the evidence and law as instructed "with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada," Mr. Harte argues defense counsel's preparation of an instruction that did not contain the critical directive that the jury was not *bound* by the sentences of the codefendants, and did not include language that the jury had no obligation to sentence Mr. Harte to an equivalent sentence, was especially prejudicial. Mr. Harte contends that had the Jury been instructed it was not *bound* to sentence Mr. Harte based upon the sentences his codefendants received, there is a reasonable probability the jury would not have given Mr. Harte an "equal and exact sentence" as that of his codefendants but rather a lesser sentence given Mr. Harte's remorse and

rehabilitation. *See Harte v. State*, 132 Nev. 410, 412-413, 373 P.3d 98, 100 (2016), noting the district court's ruling that the jury would be instructed it was not bound to sentence Mr. Harte based upon the sentences his codefendants received. Mr. Therefore, under *Hargrove v. State*, Mr. Harte is entitled to an evidentiary hearing on Ground Five of the Supplemental Petition.

5. The district court erred in dismissing Ground Six of the Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing.

In Ground Six of the Supplemental Petition, Mr. Harte alleged his sentence was invalid under the United States Constitution, Amendments V, VI, VIII, and XIV due to the cumulative errors resulting from the gross misconduct of state officials and witnesses and the deprivation of Mr. Harte's right to the effective assistance of counsel. 6JA 0907, 0918:25-27, 0919:1-2. In dismissing ground six of the Supplemental Petition the district court found there was no cumulative error because Mr. Harte's only surviving claim was ground one of the Petition and Supplemental Petition, which he had voluntarily withdrawn. 7JA 1096, 1098:13-15.

Mr. Harte has argued an evidentiary hearing should have been held on the claims in his Petition and Supplemental Petition and that he has a reasonable probability of prevailing on those claims. Therefore, Mr. Harte argues his claim of cumulative error survives and that he is entitled to an evidentiary hearing on Ground Six.

CONCLUSION

Based upon the foregoing, Mr. Harte argues he is entitled to an evidentiary hearing on Ground Two of the Petition and Supplemental Petition and Ground Five of the Supplemental Petition as he alleged sufficient facts under *Hargrove v. State*. Mr. Harte further contends he is entitled to be heard on his cumulative error claim, Ground Six of the Supplemental Petition, as it relates to all claims in his Petition and Supplemental Petition including those set forth in Grounds Three and Four of the Petition and Supplemental Petition. Therefore, Mr. Harte respectfully requests that this Court reverse the district court's order dismissing his Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals under NRAP 17 as it involves category A felonies.

DATED this 2nd day of December, 2019.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 5,263 words.

3. Finally, I certify that I have read the 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 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of December 2019.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

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

Washoe County District Attorney
Jennifer P. Noble, Chief Appellant Deputy

Aaron D. Ford
Nevada Attorney General

Via USPS

Mr. Shawn Russell Harte, # 61390
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DATED this 2nd day of December, 2019.

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