IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 78978

Appeal from an Order Denying 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

JOINT APPENDIX VOLUME 6

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

SHAWN RUSSELL HARTE,

Defendant.

_____/

Case No. CR98-0074A

Dept. No. 4

It is my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions, regardless of any opinion you may have as to what the law is or ought to be.

Instruction No. 1

If in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Instruction No. 2

All the evidence presented in this penalty hearing may be considered by the jury in deciding the proper and appropriate sentence in this case.

This evidence consists of the sworn testimony of the witnesses, both on direct and cross-examination, regardless of who called the witness, and the exhibits which have been introduced into evidence.

Instruction No. 3

Certain transcripts of prior witnesses' testimony have been read to you during this case. The content of these transcripts has been introduced into evidence, and you should consider the content of such transcripts the same as if the declarant testified him or herself in person, in court.

Instruction No. 4

Certain things are not evidence and you may not consider them in deciding what the proper and appropriate sentence should be in this case.

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from what the lawyers have stated, then your memory controls.

Questions and objections by lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or the court's ruling on it.

When an objection to evidence is sustained, or testimony is excluded or stricken by the court, or you have been instructed to disregard testimony, it is not evidence and must not be considered by you.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the proper punishment solely on the evidence received at this penalty hearing.

Instruction No. 5

You are the exclusive judges of the credibility of the witnesses who have testified in this case, which means that you must decide which witnesses are to be believed and how much weight, if any, is to be given to the testimony of each witness.

In determining the credibility of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his or her testimony, such as: his or her conduct, attitude and manner while testifying; whether the facts or opinions testified to by him or her are inherently believable or unbelievable; his or her capacity to hear or see that about which he or she testified and his or her ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him or her not to tell the truth; any statement previously made by him or her that was consistent with his or her testimony or, conversely, any statement previously made by him or her that was inconsistent with his or her testimony; his or her character for honesty or veracity or for dishonesty or untruthfulness; any admission by him or her that he or she did not tell the truth; his or her prior conviction for a felony.

If you believe that a witness willfully lied as to a material fact, you should distrust the rest of his or her testimony and you may, but are not obligated, to disregard all of his or her testimony.

However, you should bear in mind that discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that you should

disbelieve the witness, as failure of recollection is a common experience and innocent misrecollection is not uncommon. You are all certainly aware of the fact that two persons witnessing the same incident often will see or hear it differently.

Also, in considering a discrepancy in a witness's testimony, you should consider whether such discrepancy concerns an important fact or only a trivial detail.

Instruction No. 6

In considering the testimony or evidence presented to you, if a witness has been convicted of a felony, you may consider that in assessing the credibility of his or her statements. A prior felony conviction is one of the factors you may consider, giving the evidence the weight you believe it deserves after considering all evidence in the case.

Instruction No. 7

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or educations sufficient to qualify him or her as an expert on the subject to which his or her testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

Instruction No. 8

The defendant in this case has previously been found, beyond a reasonable doubt by jury verdict, to be guilty of Murder of the First Degree; therefore, under the law of this state, you must determine the sentence to be imposed upon the defendant.

First Degree Murder is punishable:

1) by imprisonment in the Nevada State Prison for life without the possibility of parole, or

2) by imprisonment in the Nevada State Prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served, or

3) by imprisonment in the Nevada State Prison for a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

Instruction No. 9

A prison term of 50 years with eligibility for parole beginning when a minimum of 20 years has been served does not mean that the defendant would be paroled after 20 years, but only that the defendant would be eligible for parole after that period of time.

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the defendant would be eligible for parole after a period of 20 years. This does not mean that the defendant would be paroled after 20 years but only that the defendant would be eligible for parole after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole.

Instruction No. 10

Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the Nevada State Prison for a term equal to and in addition to the term of imprisonment prescribed by the jury verdict, and said sentence shall run consecutively with the sentence prescribed by the jury for such crime.

The defendant in this case has also previously been found, beyond a reasonable doubt by jury verdict, to have used a deadly weapon in the First Degree Murder of John Castro Jr. Therefore, the defendant will be punished by imprisonment in the Nevada Department of Corrections for an additional sentence of an equal and consecutive term to be set by the Court for use of a deadly weapon.

In other words, the defendant's sentence must be doubled because a deadly weapon was used in the commission of the offense.

Thus, if you sentence the defendant to life with the possibility of parole after a minimum of 20 years has been served, the earliest parole eligibility would effectively be 40 years. Likewise, if you sentence the defendant to a definite term of 50 years with the possibility of parole after a minimum of 20 years has been served, the earliest parole eligibility would effectively be 40 years.

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The defendant will receive credit towards the sentence for the period of time for which the defendant has already been in custody for the crime of Murder of the First Degree.

Instruction No. 11

Mitigating circumstances are those factors which, while they do not constitute a legal justification or excuse for the commission of the offense in question, may be considered, in the estimation of the jury, in fairness and mercy, as extenuating or reducing the degree of the Defendant's moral culpability.

In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the defendant, as established by the evidence presented. Neither the prosecution's nor the defendant's insistence on the existence or nonexistence of mitigating evidence is binding upon the jurors.

Instruction No. 12

You were provided information through the letter of William Castillo. William Castillo was convicted of murder with the use of a deadly weapon, conspiracy to commit burglary, robbery of a victim over the age of 65, conspiracy to commit burglary and arson, and first degree arson on September 24, 1996, regarding the robbery and murder of Isabel Berndt, and arson of her home. In 1992 he was convicted of a separate robbery.

Instruction No. 13

You have heard evidence that the defendant shot a vehicle, being driven by Abraham Lee, in Churchill County. You must refrain from punishing the defendant for that crime or any crime other than the Murder. The penalty you impose is for the Murder conviction as it relates to the death of John Castro Jr. However, you may consider all of the evidence you heard in this trial, and the defendant's involvement in those events, when imposing sentence for the Murder conviction, for the purpose of gaining a fuller assessment of the defendant's life, health, habits, conduct, and mental and moral qualities.

Instruction No. 14

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

Instruction No. 15

In your deliberation you may not reconsider the subject of guilt or innocence of the defendant, as that issue has already been decided. Your duty is confined to a determination of the punishment to be imposed.

Instruction No. 16

It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous. However, you should not be influenced by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Instruction No. 17

Although you are to consider only the evidence in the case in reaching a penalty verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences which you feel are justified by the evidence, keeping in mind that such inferences should not be based on speculation or guess.

A penalty verdict may never be influenced by sympathy, passion, prejudice, or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

However, you may consider all mitigating evidence presented.

Instruction No. 18

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper penalty verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and the law as given you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

Instruction No. 19

During your deliberations, you will have all of the exhibits which were admitted into evidence during this penalty hearing, these written instructions, and forms of verdict which have been prepared for your convenience.

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of your have agreed upon a unanimous penalty verdict, the foreperson should sign and date the same and request the Bailiff to return you to court.

Connie J. Steinheimer
District Judge

Instruction No. 20

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

SHAWN RUSSELL HARTE,

Defendant.

/

Case No. CR98-0074A

Dept. No. 4

VERDICT OF PENALTY

The defendant, having been previously found guilty by jury verdict of MURDER OF THE FIRST DEGREE WITH THE USE OF A DEADLY WEAPON, and we the jury newly empaneled to decide and set penalty, now set the penalty to be imposed for MURDER OF THE FIRST DEGREE at Life in the Nevada Department of Corrections Without the Possibility of Parole.

DATED this 2nd day of February 2015.

FOREPERSON

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

SHAWN RUSSELL HARTE,

Defendant.

/

Case No. CR98-0074A

Dept. No. 4

JUDGMENT

The Defendant, having been found Guilty by a Jury, and a Jury having rendered a verdict as to the penalty for Murder In The First Degree With The Use Of A Deadly Weapon, Count I, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court renders judgment as follows:

That Shawn Russell Harte is guilty of the crimes of Murder In The First Degree With The Use Of A Deadly Weapon, a violation of NRS 200.010, NRS 200.030(1) and NRS 193.165, a felony, as charged in Count I and Robbery With The Use Of A Firearm, a violation of NRS 200.380 and NRS 193.165, a felony, as charged in Count II of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for Life without the possibility of parole with credit for six thousand two hundred ninety-three (6,293) days time served for Count I with a consecutive like term of imprisonment in the Nevada Department of Corrections for Life without the possibility of parole for the use of a deadly weapon; by imprisonment in the Nevada Department of

Corrections for the maximum term of one hundred eighty (180) months with the minimum parole eligibility of seventy-two (72) months, with credit for six thousand two hundred ninety-three (6,293) days time served for Count II with a consecutive like term of imprisonment in the Nevada Department of Corrections for the maximum term of one hundred eighty (180) months with the minimum parole eligibility of seventy-two (72) months for the use of a firearm. The sentences for Count II shall be served concurrently with the sentences imposed for Count I. The Defendant is further ordered to submit to a DNA Analysis Test for the purpose of determining genetic markers; to pay attorney's fees in the amount of Seven Hundred Fifty Dollars (750.00) for reimbursement of legal expenses; to pay a Twenty-Five Dollar ($25.00) administrative assessment fee; and to pay a Two Hundred Fifty Dollar ($250.00) DNA analysis fee to the Clerk of the Second Judicial District Court, said fees credited with any amounts already paid.

The fees are subject to removal from the Defendant's books at the Washoe County Jail and/or Nevada Department of Corrections.

Dated this 2 day of February, 2015.

Connie J. Steinheimer
DISTRICT JUDGE

FILED

2017 MAY -5 PM 12:10

JACQUELINE BRYANT
CLERK OF THE COURT
BY [signature]
DEPUTY

Case No. CR98-0074A

Dept. No. 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE,

Petitioner,

vs.

WARDEN ISIDRO BACA,

Respondent.

/

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence.

Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claims must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty:

NORTHERN NEVADA CORRECTIONAL CENTER, CARSON COUNTY

2. Name and location of court which entered the judgment of conviction under attack:

SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY

3. Date of judgment of conviction: 2015-02-02

4. Case number: CR98-0074A

5. (a) Length of sentence: TWO LIFE SENTENCES WITHOUT PAROLE

(b) If sentence is death, state any date upon which execution is scheduled:

6. Are you presently serving a sentence for a conviction under attack in this motion: Yes X No _____. If "yes," list crime, case number and sentence being served at this time: FIRST-DEGREE MURDER, CR98-0074A, TWO LIFE SENTENCES, AND ROBBERY WITH THE USE OF A FIREARM, CR98-0074A, 72-180 MONTHS

7. Nature of offense involved in conviction being challenged:

FIRST-DEGREE MURDER, ROBBERY WITH FIREARM

8. What was your plea? (check one)

(a) Not guilty X

(b) Guilty _____

(c) Nolo contendere _____

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: _____

_____

_____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X

(b) Judge without a jury: _____

11. Did you testify at the trial? Yes X No _____

12. Did you appeal from the judgment of conviction: Yes X No _____

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: SUPREME COURT NO. 67519

(c) Result: JUDGMENT OF CONVICTION WAS AFFIRMED.

(d) Date of result: 27 JUNE 2016

(Attach copy of order or decision, if available).

14. If you did not appeal, explain briefly why you did not: _____

_____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal: Yes _____ No X

16. If you answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: _____

(2) Nature of proceeding: _____

_____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____

_____

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: _____

_____

(c) As to any third or subsequent applications or motions, give the same information

as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion?

Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions?

Yes _____ No _____

Citation or date of decision: _____

(5) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length).

_____

_____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

a. Which of the grounds is the same: _____

_____

b. The proceedings in which these grounds were raised: _____

_____

c. Briefly explain why you are again raising these grounds. (You must relate

specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or type-written pages in length).

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18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length).

---

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). NO.

---

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No X

If yes, state what court and the case number: _____

---

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: TRIAL ATTORNEYS: MAIZIE PUSICH AND CHERYL BOND. DIRECT APPEAL: JOHN REESE PETTY

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No X

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and fact supporting same.

(a) Ground one: INEFFECTIVE ASSISTANCE OF COUNSEL.

Supporting FACTS (Tell your story briefly without citing cases or law): MAIZIE PUSICH FAILED TO ADEQUATELY PREPARE EXPERT WITNESS DR. MELISSA PIASECKI.

(b) Ground two: THE DISTRICT COURT ERRED BY ADMITTING EVIDENCE OF CODEFENDANTS' SENTENCES.

Supporting FACTS (Tell your story briefly without citing cases or law): ADMISSION OF THIS EVIDENCE DENIED MY RIGHT TO BE SENTENCED INDIVIDUALLY.

(c) Ground three: THE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS EXCESSIVE.

Supporting FACTS (Tell your story briefly without citing cases or law): THE JURY SHOULD HAVE BEEN INFORMED THAT LIFE WITHOUT PAROLE SHOULD BE RESERVED FOR ONLY THE "DEADLIEST AND MOST UNSALVAGEABLE" PRISONERS.

(d) Ground four: THE STATE SHOULD NOT HAVE BEEN ALLOWED TO ARGUE BOTH FIRST AND LAST.

Supporting FACTS (Tell your story briefly without citing cases or law): WITHOUT A BURDEN OF PROOF, THE STATE SHOULD HAVE BEEN ALLOWED TO ARGUE ONLY ONCE.

....

WHEREFORE, Petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at NNCC on the 25TH day of APRIL, 2017.

SBHarb
Signature of Petitioner

PO BOX 7000
Address

CARSON CITY, NV 89702

Signature of Attorney (if any)

Attorney for Petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

SBHarb
Signature of Petitioner

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, SHAWN RUSSELL HARTE, hereby certify pursuant to N.R.C.P. 5(b), that on the 25TH day of APRIL, 2017, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

WARDEN ISIDRO BACA
Respondent prison or jail official

1721 E. SNYDER
Address

CARSON CITY, NV 89701

Attorney General
100 North Carson Street
Carson City, Nevada 89701

WASHOE COUNTY DISTRICT ATTORNEY
District Attorney of County of Conviction

P.O. BOX ~~30083~~ 11130
Address

RENO, NV 89520-~~0083~~

SRHarte
Signature of Petitioner

AFFIRMATION
Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, _____

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
(Title of Document)

Filed in case number: CR98-0074A.

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit

_____

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 25 APR 2017

S R Harte
(Signature)

SHAWN R HARTE
(Print Name)

_____
(Attorney for)

F I L E D
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Code: 4100

Carolyn "Lina" Tanner, Esq.
Nevada Bar No. 5520
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IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO. CR98-0074A DEPT. NO. 4

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

COMES NOW, Petitioner, SHAWN RUSSELL HARTE, by and through appointed counsel, CAROLYN "LINA" TANNER, Esq., and files his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) pursuant to NRS 34.750. Petitioner incorporates his Petition for Writ of Habeas Corpus (Post-Conviction) originally filed May 5, 2017 by reference as though fully set forth herein.

PROCEDURAL HISTORY

1. On March 25, 1998, the State charged Petitioner Shawn Russell Harte ("Mr. Harte"), codefendant Latisha Babb, and codefendant Weston Sirex, with murder with the use of a deadly weapon, and robbery with the use of a firearm. Indictment, March 25, 1998.

2. Each defendant faced the death penalty at trial. Second Notice of Intent to Seek Death, August 20, 1998.

3. Each defendant was convicted by a jury on both counts. As to Mr. Harte, the jury recommended a sentence of death for the murder. The codefendants each received a sentence of life without the possibility of parole. The Court entered a judgment of conviction on May 7, 1999.

4. In *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000), the Nevada Supreme Court affirmed the conviction and death sentence on his direct appeal.

5. In *McConnel v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), the Nevada Supreme Court held that it is impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

6. In *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008), the Nevada Supreme Court upheld this Court's order granting Mr. Harte's petition for writ of habeas corpus vacating Mr. Harte's death penalty and ordering a new penalty phase trial. The codefendants' sentences remained unaffected.

7. On January 26, 2015, a penalty phase hearing began, and the jury ultimately returned a penalty verdict of life without the possibility of parole. Verdict of Penalty, February 2, 2015. The Court sentenced Mr. Harte for murder to a term of life without the possibility of parole, with credit for 6,293 days for time served, and a consecutive like term for the use of a deadly weapon. The Court also sentenced Mr. Harte to a concurrent term of 72 to 180 months in prison for the robbery, and a like consecutive term for the use of a firearm. Judgment of Conviction, February 2, 2015.

8. In *Harte v. State*, 132 Nev. Adv. Op. 40, 373 P.3d 98 (June 2, 2016), the Nevada Supreme Court upheld his conviction.

9. On May 5, 2017, Mr. Harte filed a petition for writ of habeas corpus (post-

conviction) in this case.

10. Mr. Harte incorporates the Appellant's Opening Brief in Nevada Supreme Court Docket No. 67519, Exhibit 1 hereto, as if fully set forth herein.

11. Mr. Harte incorporates the Appellant's Reply Brief in Nevada Supreme Court Docket No. 67519, Exhibit 2 hereto, as if fully set forth herein.

GROUNDS FOR RELIEF

I. Ground One: Mr. Harte's sentence is invalid under the federal constitutional guarantees of due process, and equal protection of the laws, the effective assistance of counsel, and a reliable sentence due to the ineffective assistance of counsel for failing to adequately to prepare his expert witness, Dr. Melissa Piasecki, properly. U.S. Const. V, VI, VIII, & XIV.

Facts:

1. Dr. Melissa Piasecki, M.D., a forensic psychiatrist, testified on behalf of Mr. Harte at the penalty hearing. See e.g. Transcript of Proceedings, January 30, 2015, pp. 3 – 55.

2. Dr. Piasecki had not reviewed and had limited knowledge of the evidence of a prior bad act felony shooting that occurred in Fallon, Nevada prior to Mr. Harte's arrest on the charges in this case. Id. at 35 – 36.

3. Had penalty counsel prepared Dr. Piasecki fully by providing all relevant information for her review, it is reasonably probably that Mr. Harte would have received a sentence less than life without the possibility of parole.

4. If this Court should determine that counsel acted below the standard of reasonableness in this regard, as well as others alleged throughout, the prejudice may and should be adjudged from a "cumulative error" perspective.

II. Ground Two:

Mr. Harte's sentence is invalid under the federal constitutional guarantees of due process, equal

protection of the laws, and a reliable, individualized sentence because of the district court's allowance of evidence of the codefendants' sentences imposed sixteen years prior to his penalty phase trial, and the appellate court's affirmance of this decision. U.S. Const. V, VI, VIII, & XIV.

Ground Two (A): The district court.

Facts:

1. When Mr. Harte was originally charged and tried on the offense of felony murder, he and the two codefendants each faced the death penalty. At the time of trial, the court empaneled a death penalty certified jury. Their penalty phase hearings were not bifurcated, and thus Mr. Harte was not allowed an individualized sentencing at that time. The same jury was allowed to compare and contrast the defendants in imposing penalties.

2. It is this jury panel that originally sentenced Mr. Harte to death, and then comparatively sentenced the codefendants to life without the possibility of parole. Just as Mr. Harte's death penalty was unconstitutional, the imposition of the sentences of the codefendants is in a sense analogous to the theory of "fruit of the poisonous tree." *See eg. Cf.* Shoels v. State, 114 Nev. 981, 992, 966 P.2d 742 (1998) (Springer, J. dissenting) (a "death qualified" jury increases the "likelihood that the jury will return, by way of compromise, the next most severe verdict, life without the possibility of parole.")

3. Years later, in *McConnell v. State*, *supra*, the Nevada Supreme Court found that the prosecution's use of the felony upon which the felony murder charged is predicated as the only aggravator in a capital prosecution is unconstitutional.

4. Thus, the use of a death penalty certified jury at Mr. Harte's trial was constitutionally infirm.

5. Accordingly, the Nevada Supreme Court determined that Mr. Harte's crime was not one appropriate for the death penalty, and he was granted a new penalty phase trial. The codefendants were not given a second penalty phase hearing.

6. At his penalty phase trial, the district court allowed the jury to learn of the sentences imposed by the inappropriately death qualified panel upon his co-defendants sixteen years earlier. This ruling denied Mr. Harte his right to an individualized sentencing proceeding.

7. Moreover, the jurors were allowed to compare only the sentences imposed upon the codefendants. They were not allowed to compare the codefendants as individuals at the time they passed judgment upon Mr. Harte in 2015. The jury was only afforded a snapshot in time in 1999 to compare the three defendants.

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

9. There is "no rule of law that requires a court to sentence codefendants to identical terms." *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990).

10. The issue of the use of a codefendant's sentence at a penalty phase is hardly settled. In Justice Rose's concurring opinion in *Flanagan v. State*, 107 Nev. 243, 250, 810 P.2d 759, 763 (1992), he noted that a "majority of courts that have considered the issue have determined that the sentence imposed on a codefendant is not admissible at a murder penalty hearing of the defendant." In California, courts have consistently held that evidence of a codefendant's sentence is irrelevant at the penalty phase because "it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." *People v. Cain*, 892 P.2d 1224 (Cal. 4th 1995).

11. The district court allowed the evidence of the codefendants' sentences in this case based upon NRS 175.552(3), which allows a court to admit evidence it "deems relevant to the sentence." In so ruling, the district court noted that the State argued that the sentences were relevant "because all three defendants were invested in the criminal enterprise, but it was

Harte who actually shot the victim…Circumstances of the offense for which Harte has been convicted involve unequal participation between the co-defendants and Harte. Thus, the sentences of the unequally culpable co-defendants are relevant, proper and helpful for the jury in considering the circumstances of the offense for which Harte has been convicted." Order Granting Motion in Limine to Admit Evidence of Codefendants' Sentences During Penalty Phase & Denying Defendant's Motion in Limine entered January 21, 2015 at 4.

12. The district court's rationale to admit this evidence ignored the fact that the prosecution had presented evidence during the penalty phase trial indicating that Mr. Harte was the shooter. Nothing prevented the prosecution from comparing and contrasting the behavior of the codefendants to that of Mr. Harte. But the allowance of the evidence of the codefendants' sentences of life without the possibility of parole imposed by an improperly empaneled death qualified jury all but guaranteed the resulting sentence. Evidence of the codefendants' sentences failed to shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition. It was only prejudicial.

13. At Mr. Harte's second penalty hearing in 2015, only the codefendants' sentences were used to compare and contrast against Mr. Harte. The penalty hearing was seventeen years after the crime was committed. It was sixteen years after the first penalty phase jury heard mitigating and aggravating evidence about each of the defendants. At Mr. Harte's second penalty hearing, the jury was not asked to compare and contrast the codefendants as they stood on that day years later, rather only by the sentence they received. It was not a fair comparison. It was a snapshot in time.

14. By failing to raise and preserve this issue properly, Mr. Harte was deprived of effective assistance of counsel, both at trial and on direct appeal.

15. If this Court should determine that counsel acted below the standard of reasonable

effectiveness in this regard, as well as others alleged throughout, then prejudice may and should be adjudged from a "cumulative error" perspective.

Ground Two (B): The appellate court decision.

1. On appeal of his conviction, appellate counsel states in a footnote in Mr. Harte's opening brief, "One wonders (but not for long) what position the State would have had taken had Mr. Harte's co-defendants received sentences of life with the possibility of parole that Mr. Harte wished to present to his penalty jury." See Exhibit 1. One need not wonder.

2. In 2015, the year of Mr. Harte's penalty phase retrial and appeal of his conviction, this very issue was litigated in Department 6 of the Second Judicial District Court in the case of *State v. Rodriguez*, CR98-1033B. In that case, Mr. Rodriguez was granted a new penalty hearing in a capital case after he successfully challenged his sentence in a post-conviction writ of habeas corpus. Mr. Rodriguez had received a sentence of death in 1998, and his co-defendants received lesser sentences. At his penalty retrial in which he still faced a death penalty, Mr. Rodriguez sought to introduce evidence of these lesser sentences in mitigation. The district court denied this motion. Mr. Rodriguez was again sentenced to death.

3. In an unpublished opinion of his appeal, the Court, in a four to three decision affirming the district court, stated, "We recognize, as Rodriguez points out, that some jurisdictions consider a codefendant's sentence relevant to a jury's sentencing decision… However, there is no mandatory authority requiring the admission of such evidence, and *we have reiterated the importance of individualized sentencing that takes into account a defendant's character, record, and the circumstances of the offense.*" 2015 Nev. Unpub. LEXIS 1056 at 4 (Docket No. 63423, September 11, 2015) (emphasis added). See Exhibit 3.

4. In *Rodriguez v. State*, Justice Hardesty, with Justices Parraguirre, Douglas, and Gibbons, included the majority opinion. Justice Pickering dissented, joined by Justices Cherry and

Saitta. Id. at 1.

5. In *Harte v. State*, Justice Cherry presented the majority opinion with Justice Douglas. Justice Gibbons concurred in part, and dissented in part. Specifically, Justice Gibbons stated:

> However, I would revisit this court's holding in Flanagan v. State, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991), regarding the admission of sentences of codefendants in the penalty phase of a first-degree murder hearing. I agree with appellant that there should be a uniform rule for the district courts on this issue for all penalty hearings. Therefore, I would preclude allowing evidence of the codefendants' sentences.

Harte v. State, 132 Nev. Adv. Op. 40 at 9 (June 2, 2016), 373 P.3d 98, 102.

6. While *Rodiguez* is not a case that can be taken for precedent, it is clear that in the year 2015 to 2016, the Court both affirmed a district court's denial of the use of codefendant sentences in mitigation based upon the importance of individualized sentencing", and then affirmed a district court ruling allowing co-defendant sentences to be used against a defendant based upon judicial discretion. *Rodriguez* was an en banc decision, and *Harte* was determined by a panel.

7. This supports Mr. Harte's appellate counsel's prediction that allowing this evidence to rest solely on the trial court's discretion, "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." Exhibit 2 at 3. Given the fact that a defendant has a constitutional right to individualized sentencing, these two rulings cannot be harmonized.

Ground Three: Mr. Harte's sentence of life without the possibility of parole is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because it constitutes cruel and unusual punishment. U.S. Const. VIII & XIV.

Facts:

1. The Eighth Amendment guarantees against cruel and unusual punishment and prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

2. The sentence at issue is not the sentence of death that Mr. Harte received in 1999 when he was a very young man, but rather the sentence of life without the possibility of parole he received sixteen years later, as an evolved, well mannered prisoner whose personal experiences were vastly improved.

3. In *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989), the Court struggled with the sentence of death imposed on a thirteen-year-old boy. However, regardless of the age of the defendant in that case, the Court made a significant statement about a sentence of life without the possibility of parole *in general*.

> Before proceeding we pause first to contemplate the meaning of a sentence "without possibility of parole," especially as it bears upon a seventh grader. *All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences.* Denial of this vital opportunity means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of Khamsone Kham Naovarath, he will remain in prison for the rest of his days.

105 Nev. At 526 (emphasis added). The Court did not only speak to the imposition of such a sentence on a child, but *on all* but the deadliest and most unsalvageable of prisoners.

4. The appellate court in *Harte v. State* found that the evidence of Mr. Harte's change of character between his first sentencing and his second nearly two decades later was "out of place in this proceeding." 132 Nev. Adv. Op. 40 at 8. This finding is offensive under the Eighth Amendment in the contexts of cruel and unusual punishment as well as to a defendant's right to individualized sentencing. *See* Ground 2, *supra.* If a defendant cannot

present current and relevant evidence of his character and record before the jury that is tasked with imposing sentence upon him, then, when can he?

5. Over significant evidence that Mr. Harte at thirty-seven years old was not a most deadly and unsalvageable prisoner, he was sentenced comparatively to his then-younger codefendants without evidence of their own adjustments in prison. If a prisoner, facing the death penalty without hope, who nevertheless behaves himself well in prison confines, and significantly improves his moral and spiritual character, is nevertheless condemned to die behind bars, then who should be afforded a sentence of life with the possibility of parole? The prison system afforded him the opportunity to improve himself, and he took it and thrived.

6. The evidence of the codefendants' sentences from 1999 diluted or even annihilated the evidence of Mr. Harte's character in 2015 and today, which lead to the imposition of a sentence that is thus cruel and unusual.

7. Mr. Harte recognizes that "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). The evidence of his codefendants' sentences was impalpable evidence in his second penalty hearing. It was not a complete picture of codefendants as they were in 2015. It was a snapshot in time of who they were and their role in 1998. The use of such evidence lacked any additional context from what the State could have argued simply based upon the evidence of the crime presented to the jury throughout the trial. The only conclusion the jury could make based upon comparing the sentences is that Mr. Harte was indeed a most deadly and unsalvageable prisoner despite significant evidence to the contrary. This lead to a resulting sentence that is cruel and unusual under the Eighth Amendment.

8. By failing to raise and preserve this issue properly, Mr. Harte was deprived of effective assistance of counsel, both at trial and on direct appeal.

9. If this Court should determine that counsel acted below the standard of reasonableness in this regard, as well as others alleged throughout, the prejudice may and should be adjudged from a "cumulative error" perspective.

Ground Four: Mr. Harte's sentence is invalid under the federal constitutional guarantees of due process, equal protection of the laws, trial before an impartial jury, and a reliable sentence because of the district court's error in allowing the State to argue both first and last in closing arguments at his penalty hearing. U.S. Const. V, VI, VIII, & XIV.

Facts:

1. Without case law or statute on point, the district court allowed the State to present both an opening and concluding presentation during the closing arguments at Mr. Harte's penalty hearing.

2. The State and the defense each only had a burden of persuasion in this non-death penalty sentencing hearing. NRS 175.552(4) which controls the penalty phase for non-death penalty first degree murder convictions does not allow for the State to have a concluding presentation in its closing argument.

3. The error of allowing the State to present two arguments before the jury had a cumulative effect on the partiality of the jury and reliability of Mr. Harte's sentence.

Ground Five: Mr. Harte's sentence is invalid under the federal constitution guarantees of due process, equal protection, trial by jury, and a reliable sentence because of the trial court's failure to instruct the jury properly during the penalty hearing. U.S. Const. Amends. V, VIII, & XIV.

Facts:

1. The district court instructed the jury on the consideration of the sentences of the codefendants.

Instruction 15, February 2, 2015. This instruction was insufficient to overcome the prejudice to Mr. Harte of allowing evidence of the codefendants' sentences.

2. The district court instructed the jury on their duty 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." Instruction 19, February 2, 2015 (emphasis added). This instruction compounded the constitutional errors associated with the evidence of the codefendants' sentences presented to the jury.

3. While the Nevada Supreme Court has upheld the "equal and exact justice" instruction in a guilt phase proceeding, it has done so only in the context that the instruction does not invalidate the "presumption of innocence." *See e.g.* *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288 (1998); *Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004). That is not the case here.

4. The failure to instruct the jury adequately regarding the highly prejudicial evidence of the codefendants' sentences is prejudicial to Mr. Harte. The State cannot show that the failure to instruct the jury adequately was harmless, and that failure had a substantial and injurious effect on the verdict. Instruction 15 failed to instruct the jury that they had no obligation to sentence Mr. Harte to an equivalent sentence, nor does it instruct them that they are to consider Mr. Harte's character, record, and circumstances of the offense. A rational juror would have understood the language of imposing "equal and exact justice" under the circumstances of this case, coupled with the highly prejudicial evidence of the codefendants' sentences, as directing a verdict of life without the possibility of parole.

Ground Six: Mr. Harte's sentence is invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors resulting from gross misconduct of state officials and

witnesses and the deprivation of Mr. Harte's right to the effective assistance of counsel. U.S. Const. Amends. V, VIII, & XIV.

Facts:

1. Each of the claims specified in this petition requires the vacation of Mr. Harte's sentence. Mr. Harte incorporates each and every allegation contained in this supplemental petition as well as the original petition as if fully set forth herein.

2. The cumulative effect of the errors set forth herein deprived these proceedings against Mr. Harte of fundamental fairness, resulting in a constitutionally unreliable sentence. The totality of these multiple errors and omissions resulted in substantial prejudice to Mr. Harte.

3. The State cannot show that the cumulative effect of the many constitutional errors in these proceedings was harmless. These constitutional errors in total substantially and injuriously affected the fairness of the proceedings and prejudiced Mr. Harter.

WHEREFORE, Shawn Russell Harte prays that the Court grant him relief to which he is entitled to in this proceeding.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 1st day of February, 2018.

By: /s/ *Carolyn Tanner*
CAROLYN "LINA" TANNER, ESQ.
Attorney for Petitioner Alberto Torres

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Tanner Law & Strategy Group, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

Terrance McCarthy, CDA (via e-flex)
Washoe County District Attorney's Office

Shawn Russell Harte
Northern Nevada Correctional Facility (via hand-delivery)

DATED this 1st day of February, 2018.

By: /s/ *Carolyn Tanner*
CAROLYN "LINA" TANNER, ESQ.

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,

No. 67519

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

/

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

APPELLANT'S OPENING BRIEF

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MISCELLANEOUS

I. STATEMENT OF JURISDICTION

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

II. ROUTING STATEMENT

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

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

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

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

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

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

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

IV. STATEMENT OF THE CASE

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

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

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

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

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

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

V. STATEMENT OF THE FACTS

Pre-penalty hearing motions and order

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

[2] See 2JA 185-93.

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

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

Penalty hearing

The State's Case

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

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

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

Washoe County

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

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

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

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

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

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

Churchill County

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

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

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

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

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

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

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

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

State's other evidence

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

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

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

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

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

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

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

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

4JA 599.

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

The Defense Case

Shawn Russell Harte

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

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

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

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

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

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

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

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

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

4JA 643.

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

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

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

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

Dr. Melissa Piasecki, M.D.

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

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

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

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

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

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

Post-penalty hearing motion and ruling

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

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

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

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

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

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

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

VI. SUMMARY OF ARGUMENT

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

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

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

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

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

VII. ARGUMENT

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

Standard of Review and Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Standard of Review and Discussion

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

DATED this 28th day of August 2015.

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CERTIFICATE OF COMPLIANCE

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 7,034 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 28th day of August 2015.

/s/ John Reese Petty
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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)
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Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office

EXHIBIT 2

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.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: JOHN REESE PETTY
Chief Deputy, Nevada Bar No. 10
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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

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

EXHIBIT 3

Rodriguez v. State

Supreme Court of Nevada

September 11, 2015, Filed

No. 63423

Reporter

2015 Nev. Unpub. LEXIS 1056 *; 2015 WL 5383890

PEDRO RODRIGUEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.

Notice: AN UNPUBLISHED ORDER SHALL NOT BE REGARDED AS PRECEDENT AND SHALL NOT BE CITED AS LEGAL AUTHORITY. SCR 123.

Prior History: *Rodriguez v. State, 125 Nev. 1074, 281 P.3d 1214, 2009 Nev. LEXIS 1771 (2009)*

Core Terms

sentence, district court, death sentence, death penalty, mitigating, murder, culpability, felony, circumstances, codefendant's, jury's, juror, killing, cases, accomplice, aggravating circumstances, life sentence, convicted, robbery

Judges: **[*1]** Hardesty, C.J., Parraguirre, J., Douglas, J., Gibbons, J. PICKERING, J., with whom CHERRY and SAITTA, JJ., agree, dissenting.

Opinion

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Pedro Rodriguez, Robert Paul Servin, and Brian Lee Allen, robbed and murdered Kimberly Fondy on April 5, 1998. Rodriguez and Servin were tried jointly and found guilty of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The jury imposed a sentence of death on Rodriguez.[1] We affirmed the convictions and sentences on appeal. *Rodriguez v. State, 117 Nev. 800, 32 P.3d 773 (2001)*. Rodriguez successfully challenged his sentence in a post-conviction petition for a writ of habeas corpus and was granted a new penalty hearing. *See Rodriguez v. State, Docket No. 48291 [published in table format at 125 Nev. 1074, 281 P.3d 1214] (Order Affirming in Part, Reversing in Part and Remanding, November 3, 2009)*. At a new penalty hearing, a jury again imposed a death sentence. In this appeal, Rodriguez raises issues related to the second penalty hearing.

*Motion **[*2]** to relieve counsel*

Rodriguez argues that the district court erred in denying his motion to relieve counsel because counsel failed to negotiate for a better plea deal than had been offered by the State. He further argues that the district court's inquiry into his motion was inadequate and improperly conducted in front of opposing counsel. He also contends that the district court should not have forced him to waive his attorney-client privilege for the hearing and then continue to trial with the same counsel when the motion was denied.

We conclude that the district court did not abuse its discretion in denying the motion to withdraw or discharge counsel. *See Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004)* (reviewing the "denial of a motion for substitution of counsel for abuse of discretion"). Despite his allegation of a conflict of interest, Rodriguez did not demonstrate that counsel's loyalty was compromised. Rodriguez and counsel disagreed over how to best obtain a favorable plea offer from the State. This difference of opinion did not rise to the level of a "complete collapse of the attorney-client relationship." *Id. at 969, 102 P.3d at 576*. Further, as the State clearly indicated that there was no possibility of a

[1] Rodriguez was sentenced to two equal and consecutive terms of 72 to 180 months for robbery with the use of a deadly weapon.

more lenient plea offer, their disagreement **[*3]** was essentially moot. In addition, the district court's inquiry was sufficient to address the concerns raised by Rodriguez and counsel, as the district court addressed those concerns over several hearings and considered the statements of Rodriguez, counsel, and the district attorney. Rodriguez's waiver of his attorney-client privilege was necessary to determine the extent of the alleged conflict. The inquiry was not broader than necessary to address the concerns over the plea negotiations, so it did not hinder Rodriguez's ability to litigate the penalty hearing. Therefore, the district court adequately inquired into the grounds for the motion to withdraw, Rodriguez's reason for seeking withdrawal was not meritorious, and the conflict did not prevent counsel from presenting an adequate defense or result in an unjust verdict. *See id.* (noting that this court considers "'(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion'" when reviewing a district court decision (quoting *United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)*)).

Juror challenge

Rodriguez argues that the district court erred in denying his challenge to potential juror McFarlin. We disagree. McFarlin's initial statements indicated **[*4]** that (1) he believed that the death penalty was appropriate for more than just murder cases and (2) death was the appropriate sentence for murder and it was the role of the defense to prove otherwise. Nevertheless, he acknowledged that he could listen to the evidence and follow the instructions of the district court and the district court instructed him to not presume that death is the appropriate penalty. While McFarlin expressed strong feelings about the use of the death penalty, the trial court's assessment of the juror's state of mind is entitled to great deference. *Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997)* (recognizing that when a "'prospective juror's responses are equivocal, *i.e.*, capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.'" (quoting *People v. Livaditis, 2 Cal. 4th 759, 9 Cal. Rptr. 2d 72, 831 P.2d 297, 303 (Cal. 1992)*)). Therefore, Rodriguez did not demonstrate that the district court abused its discretion in denying his challenge for cause. *Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005)*. Moreover, although Rodriguez was compelled to use a peremptory challenge to exclude McFarlin, we held in *Blake v. State* that "the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury," **[*5]** where the jury actually seated was impartial. *121 Nev. 779, 796, 121 P.3d 567, 578 (2005)*. Rodriguez does not allege that any juror actually empanelled was unfair or biased, and while he encourages this court to overrule *Blake*, he has not proffered a sufficient reason to depart from this precedent.

Evidence of codefendants' sentences

Rodriguez argues that the district court erred in denying his motion to admit evidence of the more lenient sentences imposed for his two codefendants. We discern no abuse of discretion. *See Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009)* (reviewing the admission of evidence for abuse of discretion). We recognize, as Rodriguez points out, that some jurisdictions consider a codefendant's sentence relevant to a jury's sentencing decision. *See, e.g., Ex parte Burgess, 811 So. 2d 617, 628 (Ala. 2000); State v. Marlow, 163 Ariz. 65, 786 P.2d 395, 402 (Ariz. 1989); Beardslee v. Woodford, 358 F.3d 560, 579-80 (9th Cir. 2004)*. However, there is no mandatory authority requiring the admission of such evidence, and we have reiterated the importance of individualized sentencing that takes into account a defendant's character, record, and the circumstances of the offense. *Browning v. State, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008); Harte v. State, 116 Nev. 1054, 1069, 13 P.3d 420, 430 (2000)*. Moreover, Rodriguez and his codefendants were not similarly situated. Allen pleaded guilty to avoid the death penalty. *Servin v. State, 117 Nev. 775, 793, 32 P.3d 1277, 1290 (2001)*. Servin was sentenced to death, but his sentence was vacated as excessive based on his youth at the time of the crime, his expression **[*6]** of remorse, the influence of drugs at the time of the crime, and his lack of a significant criminal background. *Id. at 793-94, 32 P.3d at 1290*. Conversely, Rodriguez did not plead guilty; he was the oldest of the three participants in the crime and, as he had known the victim prior to the crime, the apparent orchestrator of the crime; and his criminal history included a violent sexual assault on a 14-year-old victim. Therefore, the district court did not abuse its discretion in denying the motion to admit this evidence.

Motion to set aside sentence

Rodriguez contends that the district court erred in denying his motion to set aside his death sentence

because it is excessive considering that he did not shoot the victim and his codefendants received life sentences. We disagree. Rodriguez did not assert that there is insufficient evident to support the jury's decision, NRS 175.381(2) (permitting a district court to set aside verdict where insufficient evidence supports it), or that he has an intellectual disability, NRS 175.554(5) (permitting the district court to entertain a motion to set aside a death sentence based on intellectual disability). The district court did not otherwise have discretion to set aside his sentence. *See* Hardison v. State, 104 Nev. 530, 534-35, 763 P.2d 52, 55 (1988) ("[A]fter a jury has **[*7]** assessed a penalty of death, the judge has no discretion and must enter judgment according to the verdict of the jury.").

Constitutionality of his death sentence

Rodriguez asserts that because the evidence shows that Servin fired the shots that killed the victim and there have been so few executions involving defendants who did not perform the actual killing for which they were convicted, his sentence appears arbitrary and capricious and therefore unconstitutional. We disagree. The record indicates that Rodriguez intended that lethal force be employed or participated in the robbery while exhibiting a reckless indifference to the Fondy's life. *See* Guy v. State, 108 Nev. 770, 783-84, 839 P.2d 578, 587 (1992) ("'To receive the death sentence, [a defendant] must have, himself, killed, attempted to kill, intended that a killing take place, intended that lethal force be employed or participated in a felony while exhibiting a reckless indifference to human life.'" (quoting Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-93 (1991))); *accord* Tison v. Arizona, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) (holding that "major participant in the felony committed, combined with reckless indifference to human life" is sufficient to satisfy Eighth Amendment requirements for imposing death penalty). Rodriguez knew Fondy and enough information about her financial condition to believe that her **[*8]** safe contained a considerable sum of cash. He was undoubtedly aware that she was paralyzed and ambulated with the use of a wheelchair. He and two other assailants entered Fondy's home armed with two firearms. Considering Fondy's inability to resist the overwhelming force brought to bear in this robbery, it is evident that Rodriguez and his confederates intended to employ lethal force or effect the felony with a reckless indifference to her life. Moreover, Rodriguez and his codefendants' statements after the crime indicate that they intended a killing take place. In bragging about the crime later that night, Rodriguez stated, "[w]e did it, fool." Therefore, the record is sufficient to demonstrate that Rodriguez had the necessary culpability for a constitutionally imposed death sentence.[2]

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supported the three aggravating circumstances found—the murder was committed to avoid lawful arrest, the murder involved torture and/or mutilation, and Rodriguez had a prior conviction for a felony involving violence. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice, or any arbitrary factor. And third, considering Rodriguez's role in orchestrating the crime, during which considerable violence was visited on a vulnerable victim, Rodriguez's prior sexual assault conviction, and the evidence in mitigation, we conclude that Rodriguez's sentence was not excessive.

Having considered Rodriguez's contentions and concluded that they lack merit, we

ORDER **[*10]** the judgment of conviction AFFIRMED.

/s/ Hardesty, C.J.

Hardesty

/s/ Parraguirre, J.

Parraguirre

/s/ Douglas, J.

Douglas

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[2] The jury found that the murder was committed to avoid or prevent a lawful arrest, the murder involved torture or mutilation, and that Rodriguez had been previously convicted of a felony crime involving the use or threat of violence. The jury had been instructed on the statutory mitigating circumstances pursuant to NRS 200.035. The record does not indicate that the jury found any mitigating circumstances. The jury further **[*9]** concluded that any mitigating circumstance or circumstances were not sufficient to outweigh the aggravating circumstances found and sentenced Rodriguez to death.

/s/ Gibbons, J.

Gibbons

Dissent by: PICKERING

Dissent

PICKERING, J., with whom CHERRY and SAITTA, JJ., agree, dissenting:

We respectfully dissent.

In a death penalty case, it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia, 428 U.S. 153, 204, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)*. At his penalty hearing, Rodriguez sought to introduce evidence of the life sentences that his two accomplices, Robert Servin and Brian Allen, received. Initially, the district judge deemed this evidence relevant and admissible, then reversed himself and excluded it. We recognize the split of authority that exists nationally on the admissibility of accomplice sentences in a death penalty hearing, *see Postelle v. State, 2011 OK CR 30, 267 P.3d 114, 140-41 (Okla. Crim. App. 2011)* (collecting cases), and that ordinarily, the admission or exclusion of evidence is entrusted to the sound discretion of the district court, which an appellate court will not reverse absent abuse. But unless we are prepared to hold such evidence per se inadmissible—and this is not the law in Nevada, *see Flanagan v. State, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991), vacated by Moore v. Nevada, 503 U.S. 930, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992)*—Rodriguez's sentencing jury should have been told that the actual shooter, Servin, received a life **[*11]** sentence, as did Allen, his accomplice. We recognize that Rodriguez was 19 and had a prior violent felony in his background, whereas Servin and Allen were 16 and 17, respectively, without significant criminal histories. Nonetheless, the life sentences Servin and Allen received were relevant to the jury's determination of whether death was an appropriate sentence for Rodriguez. Since evidence of Servin's and Allen's participation was already before them, the evidence did not pose a significant danger of misleading the jury or delaying the proceeding. And, given that Rodriguez was not the shooter and may have been convicted on a felony murder theory,[1] we cannot say that the district court's failure to admit this evidence was harmless.

The jury must "be able to consider and give effect to all relevant mitigating evidence." *Boyde v. California, 494 U.S. 370, 377, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)*. Mitigation evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*. The majority of this court has joined jurisdictions that have concluded that an accomplice's sentence does not relate to a defendant's character or record nor is it a circumstance of the offense. *See Brogdon v. Blackburn, 790 F.2d 1164, 1169 (5th Cir. 1986)* (concluding that codefendant's sentence not relevant to defendant's character or record); *People v. Moore, 51 Cal. 4th 1104, 127 Cal. Rptr. 3d 2, 253 P.3d 1153, 1181 (Cal. 2011)* (similar); *Crowder v. State, 268 Ga. 517, 491 S.E.2d 323, 325 (Ga. 1997)* (similar); *State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 426 (N.C. 2004)* (similar); *State v. Charping, 333 S.C. 124, 508 S.E.2d 851, 855 (S.C. 1998)* (similar); *Saldano v. State, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007)* (similar). But reasonable minds can disagree, and several jurisdictions consider disparity in codefendants' sentences to be mitigating evidence. *See Ex parte Burgess, 811 So. 2d 617, 628 (Ala. 2000)* (considering state statute that requires proportionate sentencing in concluding that lenient treatment of accomplices was mitigating factor); *State v. Marlow, 163 Ariz. 65, 786 P.2d 395, 402 (Ariz. 1989)* (similar); *State v. Ferguson, 642 A.2d 1267, 1269 (Del. Super. Ct. 1992)* (similar); *see also 18 U.S.C. § 3592(a)(4) (2006)* ("In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following: (4) Equally culpable defendants.—Another defendant or defendants, equally **[*13]** culpable in the crime, will not be punished by death.").

Just as the State may present evidence about matters unrelated to aggravating circumstances, a defendant is

[1] Juries often reject the death penalty in cases where the defendant "did not commit the homicide" or "was not present when the killing took place." *Enmund v. Florida, 458 U.S. 782, 795, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)*. In fact, as the Court observed in *Enmund*, "only a small minority of jurisdictions-eight-allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed," and less than 2% of those executed between 1954 and 1982 were nontriggermen. **[*12]** *Id. at 792*.

not limited to presenting only mitigating evidence. A capital sentencing hearing has two distinct phases: an "eligibility phase," during which the jury narrows those defendants eligible for the death penalty, and a "selection phase," during which the jury decides "whether to impose a death sentence on an eligible defendant." Summers v. State, 122 Nev. 1326, 1336, 148 P.3d 778, 785 (2006) (Rose, J., concurring in part and dissenting in part); *see also* Kansas v. Marsh, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (noting that capital sentencing procedures "must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of [the] crime"). The jury's discretion must be channeled when determining whether aggravating circumstances exist and whether any circumstances that are found are outweighed by any mitigating circumstances found, but should be broadened to allow an individualized determination of whether death is an appropriate sentence. Summers, 122 Nev. at 1337, 148 P.3d at 785. As part of this individual **[*14]** determination, "evidence may be presented . . . *on any other matter* which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible." NRS 175.552(3) (emphasis added). As evidence relevant to mitigation has been "broadly defined," we have noted that "this provision is of little practical benefit to the defendant." Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). But it is not without any benefit.

In our view, the evidence concerning Servin's and Allen's sentences is relevant to the selection phase of the penalty hearing. The death penalty is reserved for those defendants who are "the worst of the worst." Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (internal quotation marks)). Capital juries are a critical "link between contemporary community values and the penal system." Gregg, 428 U.S. at 181 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)). They use the contemporary values to assess a defendant's moral culpability and impose an appropriate punishment. *See People v. Karis 46 Cal. 3d 612, 250 Cal. Rptr. 659, 758 P.2d 1189, 1204 (Cal. 1988)* ("In weighing the appropriate penalty, deciding between death and life imprisonment without possibility of parole, the jury performs a normative function, applying the values **[*15]** of the community to the decision after considering the circumstances of the offense and the character and record of the defendant."); *see also* Watson v. State, 130 Nev. Adv. Rep. 76, 335 P.3d 157, 172-74 (2014) (noting several factors, including moral culpability, as relevant to a capital sentencing determination). This selection process is important to maintaining a system where there are meaningful distinctions between those cases where the death penalty is imposed and the cases where it is not imposed. *See Callins v. Collins, 510 U.S. 1141, 1147, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994)* (Blackmun, J., dissenting) (noting that penalty scheme requires a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'" (alteration in original) (quoting Furman v. Georgia, 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring))). Accordingly, we owe jurors a duty to present all the information necessary to properly effect contemporary community values in the case at hand. *See also ABA Principles for Juries and Jury Trials*, Principle 13 (2005) ("The court and parties should vigorously promote juror understanding of the facts and the law."). And where multiple defendants are responsible for the criminal conduct which resulted in a death, consideration of the moral culpability **[*16]** of those other defendants and the penalties levied against them, to the extent that information is available, can help the jury to make a reasoned and moral judgment about whether death is appropriate for any of the perpetrators. *See* Simmons v. South Carolina, 512 U.S. 154, 172, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) ("The *Eighth Amendment* entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.") (Souter, J., concurring); United States v. Gabrion, 719 F.3d 511, 524 (6th Cir. 2013) (Mitigation evidence relating to "whether '[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death' . . . does not measure the defendant's culpability itself, but instead considers—as a moral data point—whether that same level of culpability, for another participant in the same criminal event, was thought to warrant a sentence of death. Hence this factor likewise addresses whether the defendant's culpability warrants death." (alteration in original) (quoting 18 U.S.C. § 3592(a)(4) (2012))). This court has even considered evidence of a codefendant's sentence to be "proper and helpful" for the jury's consideration during a capital penalty hearing when that evidence was offered by the State. Flanagan, 107 Nev. at 248, 810 P.2d at 762.

We further conclude that the evidence did not pose a danger of misleading **[*17]** the jury. *See* NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."). All the perpetrators were teenagers. They had not developed such lengthy social and criminal histories that explaining the differences between them would have taken the presentation of evidence in this case too far afield. In fact, during oral argument the State could not provide a single reason why admission of this evidence would cause undue delay or confusion, and the majority was able to condense the key reasons for Allen's and Servin's sentences to less than half of a paragraph: "Allen pleaded guilty to avoid the death penalty. Servin was sentenced to death, but his sentence was vacated as excessive based on his youth at the time of the crime, his expression of remorse, the influence of drugs at the time of the crime, and his lack of significant criminal background." (citations omitted). But even if the majority were correct about delays, "death is different," *Gregg*, 428 U.S. at 188, and the criminal justice system owes the utmost care to capital defendants *and* the jurors entrusted with the unenviable **[*18]** task of sentencing them. *Zant v. Stephens*, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976))). Therefore, we conclude that the district court abused its discretion in denying Rodriguez's motion to admit evidence concerning his accomplices' sentences. *See Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (reviewing the admission of evidence for abuse of discretion).

We further conclude that this error was not harmless, *see Newman v. State*, 129 Nev. Adv. Rep. 24, 298 P.3d 1171, 1181 (2013) ("A nonconstitutional error, such as the erroneous admission of evidence at issue here, is deemed harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict." (internal quotation marks omitted)), and cannot withstand our mandatory review under NRS 177.055. Rodriguez, Servin, and Allen robbed the victim. Servin and Allen brought weapons and Servin stated that he was prepared to shoot the victim if need be. Rodriguez was unarmed. After robbing the victim, Servin shot her to death while Rodriguez and Allen were outside the residence. Rodriguez was charged under **[*19]** both the premeditated and felony-murder theories of liability. The verdicts do not indicate under which theory Rodriguez was convicted, but it appears reasonably certain that the jury held Rodriguez "strictly accountable for the consequences of perpetrating a felony," under the felony-murder theory. *Sanchez-Dominguez v. State*, 130 Nev. Adv. Rep. 10, 318 P.3d 1068, 1075 (2014); *see State v. Contreras*, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002) ("The felonious intent involved in the underlying felony is deemed, by law, to supply the malicious intent necessary to characterize the killing as a murder, and . . . no proof of the traditional factors of willfulness, premeditation, or deliberation is required for a first-degree murder conviction."). In our view, it is reasonably unlikely that the jury would have sentenced Rodriguez—a nonshooter—to death if it had the benefit of the knowledge that the other perpetrators, who were equally or more morally culpable for the murder, received life sentences. Consequently, we would reverse and remand for a new penalty hearing.

/s/ Pickering, J.

Pickering

We concur:

/s/ Cherry, J.

Cherry

/s/ Saitta, J.

Saitta

End of Document

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Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SHAWN RUSSELL HARTE,

Petitioner,

v. Case No. CR98-0074a

WARDEN ISIDRO BACA, Dept. No. 4

Respondent.

_____/

ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, and answers the petition filed on or about May 5, 2017, and the supplemental petition filed on or about February 1, 2018, as follows:

1. That Respondent admits all allegations contained in paragraphs 1-22 of the petition.

2. That Respondent denies all allegations contained in paragraphs 23 and each allegation of material fact in the sections that follow paragraph 22 of the petition.

3. That Respondent admits the allegations in paragraphs 1 through 9 of the supplemental petition.

/ / /

4. That Respondent denies each and every allegation of material fact following paragraph 9 of the supplemental petition.

5. That your affiant is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition and supplemental petition are currently available, or could be made available.

6. That Respondent is informed and does believe that Petitioner's prior appeals are described in the supplemental petition filed on February 1, 2018.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: Mar 19, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on March 19, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Carolyn Tanner, Esq.

/s/ Margaret Ford
MARGARET FORD

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SHAWN RUSSELL HARTE,

Petitioner,

v. Case No. CR98-0074A

WARDEN ISIDRO BACA, Dept. No. 4

Respondent.
_____/

MOTION TO DISMISS PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the State of Nevada and moves this Honorable Court to dismiss the petition and supplemental petition for writ of habeas corpus.

This motion is predicated upon the records of this court and of the Supreme Court, and the following points and authorities.

POINTS AND AUTHORITIES

The somewhat tortured procedural history of this case is set out in the supplemental petition. The upshot is that this is a timely petition for writ of habeas corpus in a case where petitioner Harte has been convicted of murder and robbery, each with a weapon, and sentenced to two terms of life without parole, plus additional years

for the other crimes. While the petition is not procedurally barred, it nevertheless should be dismissed because each claim in the petition and the supplement is fatally flawed.

Ground One of the petition asserts that counsel in the latest sentencing hearing failed to "adequately prepare" witness Piasecki. That should be dismissed. A claim of ineffective assistance of counsel required that the petitioner identify specific acts, omissions or decision that are alleged to fall below an "objective" standard of reasonableness. The petition must also allege specific facts that tend to show a reasonable probability of a different outcome but for the failings of counsel. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065 (1984). The failure to "adequately" prepare a witness necessarily requires a subjective standard. Thus, no hearing is warranted. There are also no facts alleged showing that Dr. Piaseki would have altered her testimony based on the decisions of counsel. Therefore, no hearing is warranted on Ground One.

Ground Two asserts error in the court allowing the jury to hear of the sentences of the co-defendants. That decision was reviewed and affirmed in the last appeal. *Harte v. State,* 132 Nev. Adv. Op. 40, 373 P.3d 98 (2016)(court has discretion to allow or to not allow the evidence). Therefore that claim is barred by the doctrine of the "law of the case." *Hall v. State,* 91 Nev. 314, 535 P.2d 797 (1975).

Ground Three seems to be an assertion that the sentence was excessive. That is also barred by the law of the case as it was reviewed on the last appeal.

Ground Four concerns the order in which the parties argued. That was reviewed in the last appeal and the court found that the decision of this court was not incorrect. Therefore, the claim is barred by the law of the case.

The supplement, at Ground One, repeats the claim about Dr. Piaseki but adds nothing that would warrant a hearing.

Ground Two of the supplement repeats the claim about the sentences of the co-defendants. It is still barred by the law of the case. The suggestion that this court should overrule the Supreme Court ought to be rejected as this court lacks appellate authority over the Supreme Court of Nevada.

Ground Two also has an argument regarding a jury that agrees to follow the law as set out by the district court, sometimes known as a "death qualified" jury. Nevada law does not preclude limiting juries to those who will agree to follow the law. *McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009), as corrected (July 24, 2009)

Ground Three of the supplement asserts that the sentence amounts to cruel and unusual punishment. That was considered and rejected in the last appeal and this court lacks the authority to overrule the State Supreme Court.

Ground Four repeats the argument concerning the order of the closing arguments. That was considered and rejected on direct appeal. The court might also note that any claim of prejudice would be based on the notion that the jury decided based on arguments instead of based on evidence. That is too speculative to warrant consideration. *Strickland, supra*. 466 U.S. at 694-95 (assessment of prejudice must exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like. The analysis of prejudice must proceed on the assumption of a lawful decision-maker, conscientiously applying the correct standards).

Ground Five repeats earlier arguments but also asserts error in the instruction that the jury should do equal and exact justice to the parties. Why the defendant does

not wish to seek justice is not altogether clear. If the contention is meant to be a claim of error, it is barred by NRS 34.810. It if is meant to be a claim of ineffective assistance of appellate counsel, it is insufficient for failure to describe anything about the thought processes of appellate counsel. There is also a lack of prejudice. The instructions as a whole showed that the jury was adequately informed that they could consider mercy and anything else that they wished to consider. Given that wide discretion, and the fact that the jury did not return the most severe penalty, the notion of prejudice is too speculative to warrant consideration.

Ground Six merely asserts cumulative error. There is no error to cumulate. Accordingly, the entire petition and supplement should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: March 19, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on March 19, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Carolyn Tanner, Esq.

/s/ Margaret Ford
MARGARET FORD

F I L E D
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IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO. CR98-0074A DEPT. NO. 4

OPPOSITION TO MOTION TO DISMISS

PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

COMES NOW, Petitioner, SHAWN RUSSELL HARTE, by and through appointed counsel, CAROLYN "LINA" TANNER, Esq., and files this Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

POINTS AND AUTHORITIES

The State seeks to dismiss the Petition for Writ of Habeas Corpus and Supplemental Petition on file herein which address illegalities that occurred during the remanded penalty phase trial of Mr. Harte some sixteen years after his initial conviction of guilt and sentence of death. Mr. Harte must raise all

possible claims in this proceeding in order to preserve them for federal review.

I. Ground One: The State's motion asks that Ground One be dismissed because the failure of trial counsel to adequately prepare a witness is "subjective" and not within an "objective" standard of reasonableness. Were that a true assertion, all claims for ineffective assistance of counsel would fail. An attorney's actions related to witnesses, both in preparation and in trial, are subject to scrutiny under an objective standard of reasonableness. *See e.g.* Brown v. State, 110 Nev. 846 (1994) (court found ineffective assistance of counsel for failure to cross examine witness properly); *Davis v. State*, 107 Nev. 600, 817 P.2d 1169 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25, (2004) (Court considered issue of preparation of witness under *Strickland* standard. As noted in the Supplemental Petition, Dr. Melissa Piasecki, M.D., a forensic psychiatrist, testified on behalf of Mr. Harte at the penalty hearing. From the transcript, it is clear that Dr. Piasecki had not reviewed and had limited knowledge of the evidence of a prior bad act felony shooting that occurred in Fallon, Nevada prior to Mr. Harte's arrest on the charges in this case. Had trial counsel prepared Dr. Piasecki fully by providing all relevant information for her review, so that she could competently testify as to this event and Mr. Harte's reactions to it, it is reasonably probably that Mr. Harte would have received a sentence less than life without the possibility of parole.

II. Ground Two:

The State asks that Ground Two be dismissed because it is barred by the doctrine of law of the case. While this argument is understandable, the doctrine of law of the case is not so black and white. In the appeal of the penalty phase proceeding, Mr. Harte's counsel argued that the Court should issue "an overarching rule that evidence of codefendants'' sentences is never admissible in a penalty hearing." 132 Nev. Adv. Op. 40 (2016) at 3. This is not the argument set forth in the Petition or Supplemental Petition.

In the appeal, the Court declined to issue such a rule, "because each case has unique facts and

circumstances." *Id*. at 5. And yet, nowhere in the decision does the Court actually address the unique facts and circumstances surrounding the district court's decision to admit evidence of the codefendants' sentences handed down sixteen years earlier. Rather, the Court discussed only the issue of the discretion allowed to the district court pursuant to *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011) and *Lisle v. State*, 113 Nev. 540, 937 P.2d 473 (1997). The Court discussed how this includes the evidence of codefendant sentences at the penalty phase, relying on *Flanagan v. State*, 107 Nev. 243, 810 P.2d 759 (1991) The Court noted the limitations of judicial discretion that requires the exclusion of otherwise relevant evidence if is "impalpable, highly suspect, dubious, or tenuous." *Parker v. State*, 109 Nev. 383, 390, 849 P.2d 1062, 1067 (1993). Without addressing the unique facts and circumstances of the Mr. Harte's second penalty phase proceeding, namely that it occurred sixteen years after the death penalty proceeding that was conducted jointly over Mr. Harte and his codefendants by a death penalty qualified panel, the Court simply declined to issue a blanket rule that the introduction or exclusion of codefendant sentences are not within a district court's discretion. Accordingly, the unique facts and circumstances surrounding the inclusion of this impalpable, dubious, and tenuous evidence has yet to be addressed by the appellate court.

Moreover, the Supplemental Petition asks the district court, and ultimately the appellate court, to harmonize the decision made in this case with that made contemporaneously with *Rodriguez v. State* 2015 Nev. Unpub. LEXIS 1056 (Docket No. 63423, September 11, 2015). As noted in the Supplemental Petition, in an unpublished opinion of his appeal, the Court, in a four to three decision affirming the district court, stated, "We recognize, as Rodriguez points out, that some jurisdictions consider a codefendant's sentence relevant to a jury's sentencing decision… However, there is no mandatory authority requiring the admission of such evidence, and *we have reiterated the importance of individualized sentencing that takes into account a defendant's character, record, and the circumstances of the offense.*" 2015 Nev. Unpub. LEXIS 1056 at 4 (Docket No. 63423, September 11,

2015) (emphasis added). Of interest in the appeal of Mr. Harte's penalty phase trial, the Court states much the opposite in dicta. Almost as an aside, at the end of the decision, the Court states, "Finally, Harte's argument that he is a changed man is out of place in the is proceeding. He was appropriately sentenced based upon the crime he committed." *Harte* at 8. Neither party argued in their briefs that Mr. Harte's history since the crime was irrelevant, but the Court in dicta implied that it was in fact irrelevant. This may explain why the Court never discussed these facts to determine whether the evidence of codefendant sentences handed down sixteen years earlier without any consideration of how they each had programmed in prison as well was in fact impalpable, dubious, or tenuous. This cannot be harmonized with the *Rodriquez* opinion, which upheld the district court's exclusion of codefendant sentences as irrelevant, because of the "importance of individualized sentencing that takes into account a defendant's character, record, and circumstances of the offense." At this point, the only explanation of these two vastly different opinions is that the use or nonuse of codefendant sentences is a tool solely for the benefit of the prosecution.

This court may examine these issues today, for dicta is not subject to exclusion under the doctrine of law of the case. *Ferguson v. Las Vegas Metro Police Dep't.*, 131 Nev. Adv. Op. 94 at 10, 364 P.3d 592, 597 (2015). This court may examine the sufficiency of the jury instruction that allowed the jury to consider this tenuous evidence but failed to advise the jury of the limited relevance given the length of time between the sentencing of the codefendants and Mr. Harte, and the lack of any information of the codefendants in the sixteen years between these dates.

Mr. Harte's sentence is invalid under the federal constitutional guarantees of due process, equal protection of the laws, and a reliable, individualized sentence because of the district court's allowance of evidence of the codefendants' sentences imposed sixteen years prior to his penalty phase trial, and the appellate court's affirmance of this decision. U.S. Const. V, VI, VIII, & XIV. "The Eighth Amendment requires that defendants be sentenced individually, taking into account the individual, as

well as the charged crime." *Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145. It appears from the decision of Mr. Harte's penalty phase appeal, that this idea stated as dicta may have infected the decision on whether to issue a blanket rule to disallow codefendant sentences at penalty phase hearings, and the result was that Mr. Harte's right to an individualized sentence was violated. Ground Two should not be dismissed.

III. Ground Three:

The State seeks the dismissal of Ground Three for the same reason as Ground Two. For the same reasons set forth above, dismissal of Ground Three is inappropriate. Mr. Harte's sentence of life without the possibility of parole is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because it constitutes cruel and unusual punishment. U.S. Const. VIII & XIV. The Eighth Amendment guarantees against cruel and unusual punishment and prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society. The sentence at issue is not the sentence of death that Mr. Harte received in 1999 when he was a very young man, but rather the sentence of life without the possibility of parole he received sixteen years later, as an evolved, well mannered prisoner whose personal experiences were vastly improved.

Despite the clear language of *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989) to the contrary, the Court held that the general language that "… a*ll but the deadliest and most unsalvageable of prisoners [shall] have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences…"* was not applicable to Mr. Harte. Rather, as noted above, the Court indicated in dicta that any change of character of Mr. Harte in the sixteen years he had been in prison was in fact irrelevant. *Harte* at 8. As noted in the Supplemental Petition, this finding is offensive under the Eighth Amendment in the contexts of cruel and unusual punishment as well as to a

defendant's right to individualized sentencing. As noted above, dicta is not subject to preclusion under the law of the case doctrine. Couple this dicta with the fact that the appellate court gave no mention in the decision to the incomplete picture presented by the inclusion of the codefendants' sentences without a comprehensive jury instruction that put those sentences in context, these issues are not barred by the law of the case. And these issues led to a to a resulting sentence that is cruel and unusual under the Eighth Amendment.

IV. Ground Five:

Ground Five is an example of the impact of cumulative error. The district court instructed the jury on their duty 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." Instruction 19, February 2, 2015 (emphasis added). The language of this instruction compounded the constitutional errors associated with the evidence of the codefendants' sentences presented to the jury.

As set forth above, the failure to instruct the jury adequately regarding the highly prejudicial evidence of the codefendants' sentences is prejudicial to Mr. Harte. The State cannot show that the failure to instruct the jury adequately was harmless, and that failure had a substantial and injurious effect on the verdict. Instruction 15 failed to instruct the jury that they had no obligation to sentence Mr. Harte to an equivalent sentence, nor does it instruct them that they are to consider Mr. Harte's character, record, and circumstances of the offense. Instruction 19 compounded the error of failing to instruct the jury properly about the evidence of the codefendants' sentences. A rational juror would have understood the language of imposing "equal and exact justice" under the circumstances of this case, coupled with the highly prejudicial evidence of the codefendants' sentences, as directing a verdict of life without the possibility of parole, just as the codefendants received from a death qualified jury sixteen years prior.

V. As to all claims:

Mr. Harte's must raise all possible claims in his petition, even if such claims have been raised on direct appeal, in order to preserve them for federal review. If this Court finds that Mr. Harte is entitled to a hearing on some or all of his claims, then his claim for cumulative error must not be dismissed. sentence is invalid under the federal constitution guarantees

WHEREFORE, Shawn Russell Harte prays that the Court deny the State's Motion to Dismiss Petition and Supplemental Petition and set this matter for hearing.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 13th day of April, 2018.

By: /s/ *Carolyn Tanner*
CAROLYN "LINA" TANNER, ESQ.
Attorney for Petitioner Alberto Torres

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Tanner Law & Strategy Group, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

Terrance McCarthy, CDA (via e-flex)
Washoe County District Attorney's Office

Shawn Russell Harte
Northern Nevada Correctional Facility (via hand-delivery)

DATED this 1^{3th} day of April, 2018.

By: /s/ *Carolyn Tanner*
CAROLYN "LINA" TANNER, ESQ.

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

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

-o0o-

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

TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS PETITION AND SUPPLEMENTAL PETITION

THURSDAY, JUNE 21, 2018, 3:00 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

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY
BY: JOSEPH PLATER, ESQ.
DEPUTY DISTRICT ATTORNEY
1 S. SIERRA STREET
RENO, NEVADA

FOR THE DEFENDANT: CAROLYN TANNER, ESQ.
ATTORNEY AT LAW
RENO, NEVADA

RENO, NEVADA; THURSDAY, JUNE 21, 2018; 3:00 P.M.

-oOo-

THE COURT: Please be seated. Good afternoon.

MS. TANNER: Good afternoon.

THE COURT: The record should reflect Mr. Harte did waive his appearance and he's not present. Counsel is present for Mr. Harte and the State. This is the State's Motion to Dismiss the Petition and Supplemental Petition. You may proceed with your argument.

MR. PLATER: Thank you, Judge. I have a little bit of allergy. A little bit of fatigue from something going on.

THE COURT: Yes, I understand allergies. They are horrible.

MR. PLATER: In any event, you know Mr. Harte. The case started some years ago. He was charged with capital murder. A jury convicted him of murder with a deadly weapon, robbery with a deadly weapon and sentenced him to death. That conviction and sentence was initially upheld by the Nevada Supreme Court, then, of course, the McConnell decision came down and changed everything for Mr. Harte because, as you know, with Mr. McConnell, the Court held you can't use the same felony for the felony murder charge and as a capital aggravator, so you granted him Habeas relief. That was upheld

by the Nevada Supreme Court, and he returned here for a sentencing penalty hearing. The second jury imposed life without the possibility of parole, and then on direct appeal, he raised three arguments. He said this Court erred by allowing the State to argue first and last during the penalty hearing.

The Court should not have allowed evidence of the co-defendant's sentence in their case to be submitted to the jury.

And his sentence was excessive, although the Supreme Court reviewed it more as cruel and unusual punishment. In any event, all three of those arguments were rejected by the Nevada Supreme Court. The Court held the District Court has discretion in admitting evidence of the co-defendants' sentence in a first degree murder sentencing, and it declined to adopt Mr. Harte's argument that a court should be completely prohibited from ever introducing that type of evidence. The Court said the Court has the discretion, it just depends on the facts and circumstances of each case. We'll let the District Court have its discretion. So you properly exercised your discretion, and the Supreme Court said that the evidence was properly admitted under the discretionary standard.

The Court held his argument allowing the State to

argue twice lacked merit as well as his argument that his sentence was excessive lacked merit.

So after that, he filed a timely Habeas Petition, his first one believe it or not. Because of all the years gone by, Mr. McCarthy filed a Motion to Dismiss. In Mr. McCarthy's Motion, he addresses the original Petition first and lists I see there are four claims in the original Petition. Our argument is that Grounds Two, Three and Four are barred by the law of the case, because they essentially raise the same issues that McConnell raised in the appeal of his second penalty hearing.

THE COURT: You mean Mr. Harte.

MR. PLATER: Yeah, Mr. Harte. McConnell is the one they gave. Because Ground Two of the original Petition his assertion is the Court erred in allowing the sentence of the co-defendant.

Ground Three, the sentence was excessive.

Ground Four, which the parties argued was well addressed by the Court. The law of the case doctrine tells us when an appellate court makes a ruling on an issue regarding the same or substantial facts that are presented in some other etherial tribunal, the appellate court's ruling controls. And if you want to go back later and do a more precisely focused argument, the law of the doctrine still applies. So we think

here the doctrine prohibits, the doctrine of the law prohibits Grounds Two, Three, and Four of the original Petition.

Ground One is a claim that Harte's lawyer did not adequately prepare Dr. Piasecki. Our problem with that claim is that again, and, you know, a lot of traditional argument, it doesn't meet the Hargrove standard. It doesn't tell us what the lawyer should have done to prepare Dr. Piasecki such if he had done that additional preparation, she would have testified in such a way the result of the proceeding would have been different. We have to know what those facts are to determine whether he should get a hearing.

Now in the Supplement on this first ground, Harte gives a little more information about Dr. Piasecki. What counsel should have done, according to him, is prepared her about evidence of a prior bad act felony shooting in Fallon before his arrest in this case. Doctor Piesecki should have known about the prior bad act. Apparently, she was cross-examined on it. She didn't know about it. During her testimony at the penalty hearing, she didn't know about it. I didn't personally review that. I am assuming it is true. Here's the problem: From that factual assertion, Harte then concludes in the next paragraph had she known about that, it is reasonable to conclude Harte would have received a sentence less than life without. To me that is a non sequitur. There

is something missing in between telling Dr. Piasecki that and coming to the conclusion the jury would have come to a different conclusion. There is no causal connection showing how that is the case if she had known about that. We can't conclude automatically the jury would have given a different decision. We don't know what she would have testified about. We don't know if that would have changed her testimony. We don't know if she could have given a different diagnosis, different opinion about Mr. Harte such that now maybe the jury would have considered her testimony in a different light or considered all the other testimony in a different light.

So going on to the Supplemental Petition, Ground One is the same as in the original Petition.

Ground Two is the claim, that is the same claim as the second ground in the original Petition. Shouldn't have allowed the co-defendants' sentence before the jury.

Then the other part of the second claim in the Supplemental Petition, it goes over the appellate decision regarding what we have been talking about, whether the sentence should have been admitted in front of the jury.

If I'm reading that, Ground Three of the Supplemental Petition is his sentence is cruel and unusual punishment. The Nevada Supreme Court has already addressed that issue.

Ground Four is the same as Ground Four in the original Petition. I may have the numbers wrong. It is the same argument, the State shouldn't be allowed to argue first and last. The Nevada Supreme Court addressed that.

Ground Five is the Court erred in instructing the jury they should do equal and exact justice. We believe that instruction is proper under McConnell, and we think it doesn't show any prejudice. There is no indication the jury would have come back with a different verdict or a different sentence.

Ground Six is cumulative error. We don't think there is error in the first instance. That is basically our position.

I don't know if you have any questions.

THE COURT: No, I have no questions.

MR. PLATER: Pretty straightforward.

THE COURT: Thank you. Ms. Tanner.

MS. TANNER: Good afternoon. Carolyn Tanner on behalf of Mr. Harte. Happy first day of Summer to everybody. Glad to be back here. It has been a while. Obviously, we have presented our Opposition in writing. I will highlight that here. I want to say at the outset as his Habeas counsel, it is both a blessing and a curse to see that his counsel at the sentencing penalty phase actually for the most part did a

really good job. So we have to look at things around that circle. So the Supplemental Petition, I won't go through the counts Mr. Plater just did, it incorporates the original Petition, expands on the claims that really weren't expanded on at all in the original Petition filed by Mr. Harte and adds Claims Five and Six.

So with Claim One, the Opposition states the Court can't consider whether an attorney adequately prepared a witness, because that is subjective. As I argued in my written Opposition, that actually would follow an ineffective counsel claim, because what an attorney does is subjective. The issue is that subjective behavior is filtered through the standard of what is an objective standard of reasonableness. The Nevada Supreme Court has looked at the behavior of counsel in many different ways despite the fact that behavior is to be construed as subjective. So for instance, in the Brown case I cited in my Opposition, the Court found ineffective assistance of counsel for failure to cross-examine a victim in a sexual assault case and failure to seek concurrent sentencing. In the Davis case they talk about exactly what we are talking about. Although the Court didn't find ineffective assistance of counsel in that case, they did assess counsel's ability to adequately prepare a witness through that lens. It was not excluded as subjective.

As to Claim Two, I think probably the most important claim before the Court today, the law of the case doctrine we would argue does not apply in this case. It is a different argument. I acknowledge it is related, but it is not a distinction without a difference. It is very clear in the Order of the Supreme Court what was asked for. It is also clear in the appellate opening brief what was asked for was a blanket rule that no court could ever consider the evidence of a co-defendant's sentence at sentencing or provide that to, in this case, the jury in a sentencing proceeding. That is not the argument that we were making here. That is not the argument addressed by the Court. It tangentially did it in dicta but didn't address it. The ruling was we are not going to go that way. It is the Court's discretion to discuss this information. The supplemental brief asked this Court to look at the unique circumstances of Mr. Harte in this case and address those facts accordingly. That didn't happen on appeal because they only sought that blanket ruling taking discretion away from the Court. The focus of the appeal was on that fact, and that the Court should have discretion, not on the unique facts and circumstances of the actual sentencing. And the supplemental brief also asked this Court to look at what was going on at the same time and harmonize the two decisions that came out of this Court and out of Department 6 in the

Rodriguez case. In Harte, the Court, the Supreme Court in dicta stated Mr. Harte's history or who he was at the time of sentencing was irrelevant to this proceeding. It was the circumstances of the crime that mattered. Neither party made this argument in appeal, that the circumstances, everything he did in the sixteen years in prison mattered. Nobody made that argument. The Court said that in dicta at the end of the Opinion. In Rodriguez, the Court held the opposite in an unpublished Opinion. The defendants have to show the lesser sentence of co-defendants when he was facing the death penalty was irrelevant. Because what was actually important is the individualized sentencing that takes into account the defendant's character, record and the circumstances of the offense, the whole nine yards. With Mr. Harte's appeal this issue was also divided. In Mr. Harte's appeal, it was a three-judge panel with Judge Gibbons dissenting on this particular issue that the co-defendant's sentence should not be allowed at a penalty phase trial. In the Rodriguez case which again is unreported, it was even a four to three decision that that information should have been allowed in because it was mitigating. The Court can examine, because dicta is not subject to the exclusion under the law of the case, I cite Ferguson versus Las Vegas Metro Police Department.

In my brief as to Claim Three in the supplemental brief, it is more related to this issue than it was in the underlying appeal as to the issue of cruel and unusual punishment. The dicta that Mr. Harte's history was irrelevant affected the proceeding, there was no rule how to put the co-defendants' sentence, they received 16 years previously, in context with the person that sat before that jury, Mr. Harte, in judgment that day.

As to Claim Four, the first and last argument, I will go ahead and submit that, Your Honor.

As to Claim 5, this is an example of cumulative error.

Claim Six addresses cumulative error in general. The argument there is that in examining the overly simple Instruction 15 that said you can consider these sentences, but you have the ability to impose any sentence that you feel is relevant in the range provided. When you combine that with the co-defendants' sentence being presented and Instruction 19 which gives the equal language, the argument is that is confusing to the jury at that time.

The Motion to Dismiss states that there is no prejudice to Mr. Harte because the jury did not return the more severe penalty, and that is not the case. They in fact did return the most severe penalty available to them that day

which was life without.

One comment as to the first claim, sorry to take that out of order, as far as what the doctor would present or how it would have been different, Your Honor, I would argue, if I didn't do it entirely clear, I would ask for leave to supplement it, is that Dr. Piasecki, she was there to present a picture of what Shawn Harte was at that point in time in his life and how he was different sixteen years later before the penalty phase. So the fact that she was unaware of this prior, that was actually instrumental in how the police actually found Mr. Harte, and she wasn't able to answer on cross-examination how does that fit into your diagnosis, that is where there would have been a different result, because she could have analyzed that as if it did not fit. Presumably she would come up with that, yes, that was part and parcel of the same kind of behavior that brought him to the Court in the first place at age 21 I believe he was when the time these crimes were committed or 20, and how that has been included in that same pattern of behavior or his changed pattern of behavior over the last sixteen years. With that, I would submit it.

THE COURT: The argument in Claim Five which is that Instruction 15 should not have been given, was that raised in the appeal?

MS. TANNER: No.

THE COURT: Wouldn't it normally have to be raised in the appeal? It is not really a Writ issue.

MS. TANNER: I think if it were construed today as it was ineffective assistance of counsel to fail to make that argument, that is how I would ask that it be construed.

THE COURT: Okay. Mr. Plater, that is a little different perhaps than the way you were looking at it.

MR. PLATER: Right, because as you know, Judge, there is no allegation that counsel was ineffective under Claim Five for failing to present these arguments about the Jury Instructions. So, absent an allegation of ineffective assistance of counsel, the claim is barred under Chapter 34 because it could have been raised on direct appeal. That would be our first argument.

Second, I think these Instructions are fine. There may be a number of different Instructions that the jury has to consider in context with each other, but we know the case law is pretty clear that the juries are presumed to follow the law, presumed to understand the Instructions, so I don't see there is anything wrong with those Jury Instructions.

As to the second claim that the co-defendant's sentence shouldn't have been introduced in front of the jury, I am not sure what the claim is. If the claim is the lawyer,

the trial lawyer's appeal, the lawyer was ineffective for not raising the argument the way it is now structured, we have got a problem, because Mr. Petty raised -- He framed the issue in terms of a District Court should never give this type of evidence to a jury, and the Nevada Supreme Court said the District Courts have discretion. They could go either way, decide in their discretion according to the individual unique circumstances and facts of the case to give an Instruction or they can decline to give the Instruction. That is the rule of law that should guide the District Court. So he raised the issue as an absolute rule. They declined to follow it. If he would have raised it as a discretionary rule, then he loses as well. He did lose, and there is no claim for Habeas because it had already been addressed by the Nevada Supreme Court. So either way you go on ineffective assistance on the second claim, I don't see there is any claim that warrants a hearing. If the claim is simply the District Court, you, were in error to present this type of information, then again I think it is barred by the law of the case. Or if it should have been presented like that, it could have -- the way it is presented now in the Habeas Petition, that could have been presented on direct appeal and it is barred if it is not pleaded as an ineffective assistance claim. It is barred under Chapter 34.810.

THE COURT: I know that you are not as familiar with the trial as I was.

MR. PLATER: Sure.

THE COURT: My memory is that the Court did weigh the specific circumstances of Mr. Harte and his co-defendants. I actually followed the discretionary rule that the Supreme Court said was the right way to go, make a decision based on the individual defendant. I think that is in the record of why I allowed that testimony.

MR. PLATER: And the Nevada Supreme Court said, in their decision, we decline to issue such a ruling meaning a strict rule you should never allow that type of evidence, because each case has unique facts and circumstances.

THE COURT: So I think in my record of the trial when it was being debated whether or not this would come in, I reviewed the case law around the country and decided we did have discretion on an individual basis and made my ruling. So what I am hearing Ms. Tanner's argument is that the Supreme Court, she's arguing the Supreme Court didn't rule on whether or not my decision was right. They just ruled that I could make a decision. That is what I hear her argument is, right?

MS. TANNER: Yes.

MR. PLATER: And I think implicitly they are ruling you exercised your discretion properly. Why would they have

adopted such a rule and overlook the fact whether you abused your discretion or not? And, again, I think the law of the case doctrine applies to more precisely focused arguments so you can try to change the argument now in a more precise manner. But that rule is certainly encompassed by what the Nevada Supreme Court did, so it is barred.

THE COURT: I agree, especially in light of the record that was available to the Supreme Court when they made the decision, and the record that I made during the course of the trial. So with regard to Grounds Two, Three, Four, and Five, I think the Motion to Dismiss should be granted.

I am concerned about Ground One, dismissing it without a hearing. I understand that it is a bit vague. I would have preferred to know exactly what the evidence would have been had she known about it in advance. I don't have that. So I am going to deny the Motion to Dismiss as to Ground One. Ground One can go to hearing. That is ineffective assistance of counsel for supposedly not preparing Dr. Piasecki, and maybe they did. I don't know what the circumstances were, so I rule that one claim will go to hearing.

MR. PLATER: Would you consider, Your Honor, ordering Mr. Harte to supplement the first claim and tell us exactly what she's going to testify to?

THE COURT: Yes.

MR. PLATER: As it stands now, I don't know whether, given that information, she would have said something in favor or against her client. We need to know what it is.

THE COURT: I was going to add that.

MR. PLATER: Sorry.

THE COURT: I will allow Mr. Harte and order Mr. Harte to supplement the Petition as to Ground One and tell us in the Petition, Supplemental Petition, exactly what the evidence would have been different had the preparation taken place. That would require you to give us information with regard to Dr. Piasecki's new position, if it in fact did change. That would normally be done through argument, perhaps even Affidavit.

MS. TANNER: Do you have a deadline for that to be filed?

THE COURT: Forty-five days, and then you all, after that is filed, then you can set it for hearing on the ineffective assistance claim.

MS. TANNER: I am presuming, Your Honor, the Claim Six on just the plain cumulative will be dismissed.

THE COURT: Right. It won't be cumulative. It may be error as to Ground One, but I can't find it was cumulative.

MS. TANNER: Thank you.

THE COURT: Is there anything further for the today?

MR. PLATER:no thank you, Judge.

THE COURT: Thank you. Court's in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)

) ss.

COUNTY OF WASHOE.)

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

That as such reporter I was present in Department No. Four of the above-entitled court on Thursday, June 21, 2018 at the hour of 3:00 p.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. SHAWN HARTE, Case Number CR98-0074A.

That the foregoing transcript, consisting of pages numbered 1-20 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 9th day of May, 2019.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18