

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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SHAWN RUSSELL HARTE

Appellant,

v.

STATE OF NEVADA

Respondent.

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**CASE NO. 78978**

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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

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**JOINT APPENDIX VOLUME 1**

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ATTORNEY FOR RESPONDENT

## **INDEX TO JOINT APPENDIX VOLUME 1**

<b><i>Document</i></b>	<b><i>Date</i></b>	<b><i>Vol.</i></b>	<b><i>Page</i></b>
Answer to Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	03.19.18	6	0982
Information	01.15.98	1	0001
Judgment	05.07.99	1	0009
Judgment	02.02.15	6	0895
Jury Instructions	02.02.15	6	0872
Motion in Limine to Admit Evidence Of Co-Defendants' Sentence During Penalty Phase	09.18.14	1	0011
Motion in Limine Regarding Individualized Sentencing	09.18.14	1	0017
Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	03.19.18	6	0985
Notice of Appeal	06.10.19	7	1101
Notice of Entry of Order Dismissing Post-Conviction Petitions	05.15.19	7	1094
Notice of Voluntary Dismissal of Ground One of Petition, Supplemental Petition, and Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Final Decision	05.03.19	7	1087

**INDEX TO JOINT APPENDIX VOLUME 1 (continued)**

Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	04.13.18	6	0990
Order Dismissing Post-Conviction Petitions	05.15.19	7	1096
Order Granting Motion in Limine to Admit Evidence of Co-Defendant's Sentences During Penalty Phase & Denying Defendant's Motion in Limine	01.21.15	1	0046
Petition for Writ of Habeas Corpus (Post-Conviction)	05.05.17	6	0897
Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	08.09.18	7	1018
Supplemental Petition for Writ of Habeas Corpus (post-Conviction)	02.01.18	6	0907
Transcript of Proceedings – Hearing on Jury Instructions	01.16.15	1	0023
Transcript of Proceedings – Motion to Dismiss Petition and Supplemental Petition	06.21.18	6	0998
Transcript of Proceedings – Resolution of Outstanding Matters Prior to Jury Trial	01.21.15	1	0052
Transcript of Proceedings – Trial (Penalty Phase) Day 1	01.26.15	1	0106
Transcript of Proceedings – Trial (Penalty Phase) Day 2	01.27.15	2 3	0122-0371 0373-0390

**INDEX TO JOINT APPENDIX VOLUME 1 (continued)**

Transcript of Proceedings – Trial (Penalty Phase) Day 3	01.28.15	3	0391
Transcript of Proceedings – Trial (Penalty Phase) Day 4	01.29.15	4	0537
Transcript of Proceedings – Trial (Penalty Phase) Day 5	01.30.15	5	0693
Transcript of Proceedings – Trial (Penalty Phase) Day 6	02.02.15	5	0790
Verdict (Murder)	03.19.99	1	0006
Verdict (Robbery)	03.19.99	1	0008
Verdict of Penalty	02.02.15	6	0894

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STATE VS SHAWN HARTE ET AL 5 Pages  
District Court 01/15/1998 02:09 PM  
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DA #156974

WCSO 247540-97

Case No. CR98-0074

Dept. No. 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

INFORMATION

LATISHA MARIE BABB,  
WESTON EDWARD SIREX, and  
SHAWN RUSSELL HARTE,

Defendants.

RICHARD A. GAMMICK, District Attorney within and for  
the County of Washoe, State of Nevada, in the name and by the  
authority of the State of Nevada, informs the above entitled  
Court that LATISHA MARIE BABB, WESTON EDWARD SIREX, and SHAWN  
RUSSELL HARTE, the defendants above named, have committed the  
crimes of:

COUNT I. MURDER, a violation of NRS 200.010, NRS  
200.030(1) and NRS 193.165, a felony, in the manner following:

That the said defendants, LATISHA MARIE BABB, WESTON  
EDWARD SIREX, and SHAWN RUSSELL HARTE, individually and/or in  
joint participation, on the 26th day of October A.D. 1997, or

1 thereabout, and before the filing of this Information, at and  
2 within the County of Washoe, State of Nevada, did willfully,  
3 unlawfully, and with malice aforethought, deliberation, and  
4 premeditation, kill and murder JOHN CASTRO, a human being, by  
5 means of shooting JOHN CASTRO in the head with a .22 calibre  
6 handgun, thereby inflicting mortal injuries upon the said JOHN  
7 CASTRO from which he died on October 26, 1997; or.

8           That the said defendants, LATISHA MARIE BABB, WESTON  
9 EDWARD SIREX, and SHAWN RUSSELL HARTE, individually and/or in  
10 joint participation, on or about the 26th day of October A.D.  
11 1997, or thereabout, and before the filing of this Information,  
12 at and within the County of Washoe, State of Nevada, did  
13 unlawfully kill and murder JOHN CASTRO, a human being, during the  
14 perpetration of a robbery with the use of a deadly weapon, by  
15 means of shooting JOHN CASTRO in the head with a .22 calibre  
16 handgun, thereby inflicting mortal injuries upon JOHN CASTRO from  
17 which he died on October 26, 1997; or.

18           That the said defendants, LATISHA MARIE BABB, and  
19 WESTON EDWARD SIREX, individually and/or in joint participation,  
20 on or about the 26th day of October A.D. 1997, or thereabout, and  
21 before the filing of this Information, at and within the County  
22 of Washoe, State of Nevada, did aid, abet, and/or encourage SHAWN  
23 RUSSELL HARTE who did willfully and unlawfully, and with malice  
24 aforethought, deliberation, and premeditation, kill and murder  
25 JOHN CASTRO, a human being, by means of shooting JOHN CASTRO in  
26 the head with a .22 calibre handgun, thereby inflicting mortal

1 injuries upon the said JOHN CASTRO from which he died on October  
2 26, 1997, in that the defendant LATISHA MARIE BABB followed the  
3 taxi cab which JOHN CASTRO was driving in SHAWN RUSSELL HARTE's  
4 vehicle to provide a means of escape after the murder, and/or the  
5 said defendant LATISHA MARIE BABB did assist in the preparation  
6 and design of the robbery and murder of JOHN CASTRO, and/or that  
7 the said defendant LATISHA MARIE BABB did directly or indirectly  
8 encourage SHAWN RUSSELL HARTE to shoot JOHN CASTRO, and in that  
9 the said defendant WESTON EDWARD SIREX did assist in the  
10 preparation and design of the robbery and murder of JOHN CASTRO,  
11 and/or that the said defendant WESTON EDWARD SIREX did directly  
12 or indirectly encourage SHAWN RUSSELL HARTE to shoot JOHN CASTRO.

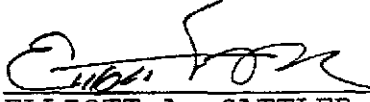
13 COUNT II. ROBBERY WITH THE USE OF A FIREARM, a  
14 violation of NRS 200.380 and NRS 193.165, a felony, in the manner  
15 following:

16 That the said defendants, LATISHA MARIE BABB, WESTON  
17 EDWARD SIREX, and SHAWN RUSSELL HARTE, on the 26th day of October  
18 A.D. 1997, or thereabout, and before the filing of this  
19 Information, at and within the County of Washoe, State of Nevada,  
20 did willfully and unlawfully take personal property, to wit:  
21 Eighty-Nine Dollars in United States Currency and coin from the  
22 person of JOHN CASTRO, at 17865 Cold Springs Drive, Reno, Washoe  
23 County, Nevada, against his will, and by means of force or  
24 violence to his person and with the use of a .22 calibre handgun  
25 with which the defendant HARTE shot the victim after defendant  
26 SIREX and HARTE had entered the victim's taxicab for the purpose

1 of robbing the driver. Defendant Babb followed the taxi in  
2 HARTE's vehicle to provide a means of escape after the robbery  
3 was complete.  
4

5 All of which is contrary to the form of the Statute in  
6 such case made and provided, and against the peace and dignity of  
7 the State of Nevada.

8 RICHARD A. GAMMICK  
9 District Attorney  
Washoe County, Nevada

10  
11 By:   
12 ELLIOTT A. SATTLER, II  
Deputy District Attorney

13  
14 **DUPLICATE ORIGINAL**  
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1           The following are the names and addresses of such  
2 witnesses as are known to me at the time of the filing of the  
3 within Information:  
4

5 WASHOE COUNTY SHERIFF'S OFFICE

6 DETECTIVE JIM BELTRON  
7 DETECTIVE TONY MIRANDA  
8 SERGEANT DAVID BUTKO  
9 DEPUTY CHUCK LOWE  
10 SERGEANT WES KNIGHT  
11 DEPUTY CHRIS AREVALO

12 RANDY GONZALES, 17785 Cold Springs Drive, Reno, Nevada 89506


13 MELVIN McINTYRE, 17845 Cold Springs Drive, Reno, Nevada 89506

14 JIM OSTRANDER, 17825 Cold Springs Drive, Reno, Nevada 89506

15 WASHOE COUNTY CORONER'S

16 D. PALSSAARI  
17  
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23

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

24 By   
25 ELLIOTT A. SATTLER, II  
26 Deputy District Attorney

PCN 88287524 BABB  
88730032 SIREX  
88752791 HARTE

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CR98-0074A  
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STATE VS. SHAWN HARTE ET AL 2 Pages  
District Court 03/19/1999 09 00 AM  
Washoe County 4245  
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Case No. CR98-0074

MAR 19 1999

Dept. No. 4

AMY HARVEY  
By: M. Stoll  
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\*\*\*

THE STATE OF NEVADA,

Plaintiff,

v.

VERDICT

SHAWN RUSSEL HARTE,

Defendant.

We, the jury in the above-entitled matter, find the  
defendant, SHAWN RUSSEL HARTE, GUILTY of MURDER.

DATED this 19<sup>th</sup> day of March, 1999.

Bradford L. Satt  
FOREPERSON

Having found the defendant guilty of Murder, you must  
answer the following question: Was it Murder of the First Degree  
or Murder of the Second Degree?

X Murder of the First Degree

       Murder of the Second Degree

Bradford L. Satt  
FOREPERSON

If you have found the defendant guilty of Murder, you must answer the following question: Was a deadly weapon used in the commission of this Murder as defined in these instructions?

Yes        No       

Brian L. Sutt  
FOREPERSON

CR98-0074A DC-9900017556-001  
STATE VS. SHAWN HARTE ET AL ( 1 Page  
District Court 03/19/1999 09:00 AM  
Washoe County : 4245  
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FILED

Case No. CR98-0074

MAR 19 1999

Dept. No. 4

AMY HARVEY  
By: M. Stone  
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\*\*\*

THE STATE OF NEVADA,

Plaintiff,

v.

VERDICT

SHAWN RUSSEL HARTE,

Defendant.

We, the jury in the above-entitled matter, find the  
defendant, SHAWN RUSSEL HARTE, GUILTY of COUNT II: ROBBERY.

DATED this 19<sup>th</sup> day of March, 1999.

Bredford L. Satt  
FOREPERSON

If you have found the defendant guilty of Robbery, you  
must answer the following question: Was a deadly weapon used in  
the commission of this Robbery as defined in these instructions?

X Yes

\_\_\_\_ No

Bredford L. Satt  
FOREPERSON

CR98-0074A DC-9900017620-060  
STATE VS SHAWN HARTE ET AL 2 Pages  
District Court 05/07/1999 09:00 AM  
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1 Case No. CR98-0074  
2 Department No. 4

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AMY HARVEY, CLERK  
By: [Signature]  
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE

8  
9 STATE OF NEVADA,  
10 Plaintiff,

Reporter: D. Phipps

11 Vs.

JUDGMENT

12 SHAWN RUSSELL HARTE,  
13 Defendant.  
14

15 No sufficient cause being shown by Defendant as to why judgment should  
16 not be pronounced against him, the Court rendered judgment as follows:

17 That Shawn Russell Harte is guilty of the crime of Murder in the First  
18 Degree With The Use Of A Deadly Weapon, a violation of NRS 200.010, NRS 200.030(1)  
19 and NRS 193.165, a felony, as charged in Count I and Robbery With The Use Of Deadly  
20 Weapon, a violation of NRS 200.380 and NRS 193.165, a felony, as charged in Count II  
21 of the Indictment, and that he be punished to Death, for Count I; and by imprisonment  
22 in the Nevada Department of Prisons for the maximum term of one hundred eighty (180)  
23 months with the minimum parole eligibility of seventy-two (72) months with credit for five  
24 hundred forty-one (541) days time served, for Count II, with a consecutive term of the  
25 maximum term of one hundred eighty (180) months with the minimum parole eligibility  
26 of seventy-two (72) months for the use of a deadly weapon. The sentence in Count II

1 shall be served concurrently with the sentence in Count I. Defendant is further punished  
2 by submission to DNA analysis testing for the purpose of determining genetic markers;  
3 and payment of attorney's fees in the amount of Seven Hundred Fifty Dollars (\$750.00)  
4 to the Washoe County Public Defender's Office. Defendant is further ordered to pay a  
5 Twenty-Five Dollar (\$25.00) administrative assessment fee and a Two Hundred Fifty  
6 Dollar (\$250.00) DNA testing fee to the Clerk of the Second Judicial District Court.

7 Dated this 7th day of May, 1999.

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9 Connie J. Steinheimer  
10 DISTRICT JUDGE  
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1 CODE  
2 Richard A. Gammick  
3 #001510  
4 P.O. Box 30083  
5 Reno, NV 89520-3083  
6 (775) 328-3200  
7 Attorney for Plaintiff

8  
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
10  
11 IN AND FOR THE COUNTY OF WASHOE.

12 \* \* \*

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR98-0074A

15 v.

Dept. No. 4

16 SHAWN RUSSELL HARTE,

17 Defendant.

18 \_\_\_\_\_/  
19 MOTION IN LIMINE TO ADMIT EVIDENCE OF CO-DEFENDANTS'  
20 SENTENCES DURING PENALTY PHASE

21 COMES NOW, the State of Nevada, by and through RICHARD A.  
22 GAMMICK, District Attorney of Washoe County, and ZACH YOUNG, Deputy  
23 District Attorney, and moves this Honorable Court for an Order granting  
24 the State's Motion in Limine to allow for the admission of evidence of  
25 the co-defendants' sentences during the Penalty Phase of the instant  
26 case. This Motion is based upon the following Points and Authorities,  
all papers and pleadings on file herein, and any oral arguments to be  
presented to this Court.

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1 In the instant case, the State seeks to admit evidence that  
2 the Defendant's co-defendants, Mr. Sirex and Ms. Babb, were jointly  
3 tried with the Defendant and received sentences of Life Without the  
4 Possibility of Parole. The Nevada Supreme Court addressed this very  
5 issue in Flanagan v. State, 107 Nev. 243 (1991) (judgment vacated on  
6 other grounds), and found that such evidence was properly admitted.<sup>1</sup>  
7 In Flanagan, the defendants, whose death sentences were decided by a  
8 jury, contended "that the district court's allowance of testimony  
9 regarding the sentences of the other four co-defendants violated  
10 their Eighth Amendment rights to have the jury consider their  
11 individual characters and records and the circumstances of their  
12 particular crimes." 107 Nev. at 247. The Nevada Supreme Court  
13 resoundingly rejected such an argument, stating:

14 "We conclude that the district court did not err  
15 in allowing the testimony about the sentences of  
16 the other co-defendants. The evidence was  
17 admissible under NRS 175.552 as 'any other matter  
18 which the court deems relevant....' Furthermore,  
19 the jury was instructed that it was not bound by  
20 the previous sentences. We believe that it was  
21 proper and helpful for the jury to consider the  
22 punishments imposed on the co-defendants." Id. at  
23 247-248 (citation omitted).

24 As such, evidence of the sentences imposed upon Mr. Sirex  
25 and Ms. Babb is clearly admissible against the Defendant during his  
26

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27 <sup>1</sup> The Flanagan judgment was vacated based upon the United States Supreme Court  
28 ruling in Dawson v. Delaware, 503 U.S. 159 (1992). In Dawson, the question  
29 presented was "whether the First and Fourteenth Amendments prohibit the  
30 introduction in a capital sentencing proceeding of the fact that the defendant was  
31 a member of an organization called the Aryan Brotherhood, where the evidence has no  
32 relevance to the issues being decided in the proceeding." 503 U.S. at 160. The  
33 issue presented in Dawson has no effect on the issue decided in Flanagan regarding  
34 the admissibility of co-defendants' sentences. Accordingly, Flanagan, as concerned  
35 with such admissibility and relevant to the instant Motion, remains good law.

1 Penalty Phase. The evidence in the instant case is that all three co-  
2 defendants were fully invested in the criminal enterprise, but it was  
3 *the Defendant* who was the person who actually shot the victim. The  
4 jury should be able to consider the severity of the non-shooting co-  
5 defendants' sentences when imposing sentence for the Defendant. Such  
6 evidence is clearly relevant, and "[f]ew limitations are imposed on a  
7 judge's right to consider evidence in imposing a sentence." Denson v.  
8 State, 112 Nev. 489, 492 (1996) (citation omitted); also see Williams  
9 v. New York, 337 U.S. 241, 247 (1949) (declaring that a sentencing  
10 judge's task "is to determine the type and extent of punishment"  
11 without being confined by the narrow issue of guilt).

12           Should this Court allow for the introduction of the  
13 sentences imposed upon the co-defendants, then the State would not  
14 oppose a jury instruction articulating that the jury may consider the  
15 sentences imposed upon the co-defendants, but such sentences are not  
16 binding. Flanagan, 107 Nev. at 248.

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AFFIRMATION PURSUANT TO NRS 239B.030

Dated this 18th day of September, 2014.

By /s/ Zach Young  
ZACH YOUNG  
9227  
Deputy District Attorney

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I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MAIZE PUSICH, CHIEF DEPUTY PUBLIC DEFENDER  
350 S. CENTER STREET  
RENO, NEVADA 89501

CHERYL BOND, DEPUTY PUBLIC DEFENDER  
350 S. CENTER STREET  
RENO, NEVADA 89501

DATED this 18th day of September, 2014.

/S/TERRI NORRIS  
TERRI NORRIS

1 Code 2245  
2 WASHOE COUNTY PUBLIC DEFENDER  
3 MAIZIE W. PUSICH, BAR NO. 2808  
4 CHERYL BOND, BAR NO. 3915  
5 P.O. BOX 11130  
6 RENO, NV 89520-0027  
7 775) 337-4800  
8 ATTORNEY FOR DEFENDANT

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
10  
11 IN AND FOR THE COUNTY OF WASHOE

12 THE STATE OF NEVADA,

13 Plaintiff,

14 v.

Case No. CR98-0074A

15 SHAWN R. HARTE,

Dept. No. 9

16 Defendant.  
17 \_\_\_\_\_/

18 **MOTION IN LIMINE REGARDING INDIVIDUALIZED SENTENCING**

19 COMES NOW SHAWN R. HARTE, by and through counsel Washoe County Public  
20 Defender JEREMY T. BOSLER, and deputies MAIZIE W. PUSICH and CHERYL BOND and  
21 hereby presents this motion in limine regarding individualized sentencing.

22 **POINTS AND AUTHORITIES**

23 **1. STATEMENT OF THE CASE**

24 SHAWN R. HARTE has been convicted of murder in the first degree, with the use of a  
25 deadly weapon. He faces sentencing by jury beginning January 26, 2015. The jury will  
26 consider two sentencing options, and the weapon enhancement. Those options will be life with  
the possibility of parole, or life without the possibility of parole. Because Mr. HARTE was  
convicted before July 1, 2007, the enhancement pursuant to NRS 193.165 will be a like,

1 consecutive sentence to the sentence the jury imposes for the murder conviction. The  
2 applicable sentence is measured at the date of offense, not the date of sentencing. State v.  
3 Second Judicial District Court ex rel. County of Washoe, 124 Nev. 564, 188 P.3d 879 (2008).

## 4 5 **2. ARGUMENT**

6 SHAWN HARTE must be sentenced individually. Evidence for sentencing is limited to  
7 evidence which bears on the defendant's personal responsibility and moral guilt. Juries in  
8 Nevada sentence only for conviction of murder in the first degree. NRS 175.552.

9 Nevada does not recognize proportionality as an appropriate consideration in sentencing  
10 for murder. Prior to 1985 proportionality was part of the analysis of capital sentences. In other  
11 words, was the sentence received by one offender consistent with that received for an offender  
12 similarly situated. However, in 1985 the Nevada Legislature amended NRS 175.055, removing  
13 proportionality review of capital sentences. The Court explained, "[i]n dispensing with  
14 proportionality review, we have recognized that penalties imposed in other similar cases in this  
15 state are 'irrelevant' to the excessiveness analysis not required by NRS 177.055(2)." The Court  
16 then concludes that while it had reviewed the sentences of other offenders on prior occasions,

17 Nonetheless, *Chambers* does not stand for the proposition that this court will  
18 conduct proportionality review of death sentences as part of the excessiveness  
19 analysis despite the Legislature's abolishment of such review. The fact that others  
20 guilty of first-degree murder may have received greater or lesser penalties does  
21 not mean that a defendant whose crime, background and characteristics are  
22 similar is entitled to receive a like sentence. However, as apparent in *Chambers*,  
our determinations regarding excessiveness of the death sentences of similarly  
situated defendants may serve as a frame of reference for determining the crucial  
issue in the excessiveness analysis: are the crime and defendant before us on  
appeal of the class or kind that warrants the imposition of death?

23 Dennis v. State, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000).

24 The jury in this case will not be considering a death sentence. However, NRS 175.552,  
25 which governs sentencing by jury is not limited to capital sentencing. The analytical  
26 framework discussed by the Nevada Supreme Court in Dennis, supra, is the same in this case.

1 NRS 177.055, referenced in the opinion, provides for an automatic appeal of a death sentence,  
2 not at issue in this case. However, the factors to be considered by the Supreme Court during an  
3 automatic appeal are instructive. The Court must consider “the crime and the defendant.” NRS  
4 177.055(2)(e). Neither the Supreme Court, nor the sentencing Court are instructed to consider  
5 other crimes and other defendants.

6 The sentences received by the other defendants are based on individualized facts. Mr.  
7 HARTE’s responsibility is not reflected in the sentences of the original co-defendants because  
8 they are individualized. The sentences of the original co-defendants should not be admitted in  
9 evidence at Mr. HARTE’s sentencing.

10 “The Constitution requires the jury to make an individualized determination as to  
11 whether the defendant should be executed based on the ‘character of the individual and the  
12 circumstances of the crime.’” Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d  
13 720 (1991), citing Booth v. Maryland 482 U.S., at 502, 107 S.Ct. at 2532 (1987); quoting Zant  
14 v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983). Chief Justice  
15 Rehnquist in Payne goes on to say that the Booth Court found: “...other factors are irrelevant to  
16 the capital sentencing decision unless they have some bearing on the defendant's ‘personal  
17 responsibility and moral guilt.’” Booth v. Maryland, 482 U.S., at 502, 107 S.Ct. at 2533 (1987);  
18 quoting Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982).

19 The Chief Justice’s argument in Payne only takes issue with the idea that harm caused  
20 was not seen by the Booth Court as part of evidence of “blameworthiness” and leaves in place  
21 the concept that evidence is proper if it provides an individualized judgment based on the  
22 responsibility and the moral guilt of the party being sentenced. Sentences received by others  
23 cannot and do not reflect on Mr. HARTE’s blameworthiness.

24 ///

25 ///

26 ///

Pulley v. Harris, 465 U.S. 37, 46 in referencing Furman v. Georgia, 408 U.S. 238 and Gregg v. Georgia, 428 U.S. 153 puts the need as “...sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use...” As stated above, what is relevant to imposition of sentence by a jury is evidence of a person’s blameworthiness, moral guilt, and personal responsibility.

Nevada is not the only state in which arguments that sentences should be proportional has been rejected. In Pulley V. Harris, 465 U.S. 37, 44, 104 S.Ct. 871, 79 L.Ed.2d 29 (1983), the Court concludes that a review of similarly situated capital defendants, a proportionality review, is not required by the Eighth Amendment. In Pulley, supra, the Supreme Court was reviewing an appeal from a California judgment. In reaching its decision, the Court reviewed earlier decisions in which it addressed sentencing schemes from Florida, Georgia and Texas. In all it found that proportionality review was not required to avoid arbitrariness.

Payne, supra, requires sentencing for murder must be based on the character of the criminal and circumstances of the crime. The penalties given others provides the jury no evidence relating to Mr. HARTE's character. Nor does it describe the circumstances of the offense. Therefore, it is inadmissible during Mr. HARTE's sentencing.

### 3. CONCLUSION

Sentencing for a conviction of murder is done by a jury in Nevada. The jury will be called upon to assess aggravating circumstances. NRS 200.030. It may also be permitted to consider evidence pursuant to NRS 175.552, other acts evidence. However, it cannot sentence

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1 based upon evidence that is irrelevant and inadmissible. The sentences received by others are  
2 both. The jury should not be advised of the sentences given the codefendants by other juries.

3 **AFFIRMATION PURSUANT TO NRS 239B.030**

4  
5 The undersigned does hereby affirm that the preceding document does not contain the  
6 social security number of any person.

7 Dated this 18<sup>th</sup> day of September, 2014.

8  
9 JEREMY T. BOSLER  
Washoe County Public Defender

10  
11 By /s/ MAIZIE W. PUSICH  
12 MAIZIE W. PUSICH  
Chief Deputy Public Defender

13  
14 By: /s/ CHERYL BOND  
15 CHERYL BOND  
Deputy Public Defender

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Washoe County Public Defender's Office,  
and that on this date I electronically served a copy of the foregoing:

MOTION IN LIMINE REGARDING INDIVIDUALIZED SENTENCING

Addressed to:

ZACH YOUNG, Deputy District Attorney  
MATT LEE, Deputy District Attorney  
1 South Sierra St., Reno, Nevada

DATED this 18<sup>th</sup> day of September, 2014.

\_\_\_\_\_  
/s/ LINDA GRAY  
LINDA GRAY

1 4185

2 JUDITH ANN SCHONLAU

3 CCR #18

4 75 COURT STREET

5 RENO, NEVADA

6  
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

10 -o0o-

11 THE STATE OF NEVADA, )

12 Plaintiff, )

13 vs. )

14 SHAWN HARTE, )

15 Defendant. )

) CASE NO. CR98-0074A

) DEPARTMENT NO. 4

16  
17 TRANSCRIPT OF PROCEEDINGS

18 HEARING ON JURY INSTRUCTIONS

19 FRIDAY, JANUARY 16, 2015, 9:15 A.M.

20 Reno, Nevada

21  
22 Reported By: JUDITH ANN SCHONLAU, CCR #18  
23 NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER  
24 Computer-aided Transcription

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A P P E A R A N C E S

FOR THE PLAINTIFF:           OFFICE OF THE DISTRICT ATTORNEY  
  
                                  BY:   ZACH YOUNG, ESQ.  
  
                                  MATTHEW LEE, ESQ.  
  
                                  DEPUTY DISTRICT ATTORNEYS  
  
                                  WASHOE COUNTY COURTHOUSE  
  
                                  RENO, NEVADA

FOR THE DEFENDANT:           OFFICE OF THE PUBLIC DEFENDER  
  
                                  BY:   MAIZIE PUSICH, ESQ.  
  
                                  CHERYL BOND, ESQ.  
  
                                  DEPUTY PUBLIC DEFENDER  
  
                                  350 S. CENTER STREET  
  
                                  RENO, NEVADA

1 RENO, NEVADA; FRIDAY, JANUARY 16, 2015; 9:15 A.M.

2 -oOo-

3 THE COURT: Good morning, counsel.

4 MS. PUSICH: Good morning, Your Honor.

5 MS. BOND: Good morning.

6 MR. YOUNG: Good morning.

7 MR. LEE: Good morning.

8 THE COURT: Today we had planned to talk about Jury  
9 Instructions, so I want to do that. The first thing that I  
10 really wanted to kind of talk about, one of my concerns was  
11 what were we going to tell the jury about the second trial,  
12 and were we going to use a Jury Instruction, just a statement  
13 made by the Court, how did you want to do that. I, of course,  
14 hadn't seen anything in that regard.

15 MR. YOUNG: I apologize not getting something to you  
16 earlier. I frankly, we kind of recalled that recently.  
17 Mr. Lee and I worked on a one and a half paragraph Instruction  
18 to provide Ms. Pusich. Ms. Bond looked at it this morning,  
19 made a couple of corrections. I can show you the chalked up  
20 version if you would like at this point, or I can make the  
21 corrections, finalize a couple of things and get that to you  
22 either later today or Tuesday, whichever you prefer. We have  
23 very briefly started working on it. It is a very brief  
24 statement. Unless the Court chooses otherwise, the defense

1 and the State are not anticipating telling the jury about the  
2 prior sentencing and then having that overturned. Simply date  
3 of trial, date of the conviction and a sentencing was ordered.  
4 We do finish up with a paragraph for sentencing they are not  
5 to consider the delay. I can show you, it is a rough draft, I  
6 can show you now.

7 THE COURT: That is all right. I would like you all  
8 to work on it. If you can stipulate to something, that would  
9 be great.

10 MR. YOUNG: I think we can.

11 MS. PUSICH: I think we can as well, Your Honor. I  
12 think it is better, I think, if we can formally have the  
13 written treated as an Instruction. I am confident we can  
14 provide you something we all agree with.

15 THE COURT: Okay. Your anticipation is that would  
16 be part of my initial statements at voir dire?

17 MS. PUSICH: Yes, please.

18 MR. YOUNG: Yes.

19 THE COURT: So Tuesday is fine on that if you can  
20 get that to me then in writing and the stipulation. Okay. So  
21 that being said, we have been notified by the Jury  
22 Commissioner she's going to call 100 potential jurors, and I  
23 believe that is sufficient. Do you see any reason why we  
24 would need anything more than that?

1           MR. YOUNG: I think that is more than enough, Your  
2 Honor.

3           MS. PUSICH: Your Honor, I agree. Obviously, if it  
4 appears it turns out we have fifty of them that remember the  
5 case, we'll have to deal with that. Generally, that is as  
6 many I have seen called in a homicide case, so I think that  
7 will be enough.

8           THE COURT: We will see. I think she plans to get  
9 those to you early. We have that order granting that request  
10 to have the information early, and so we will double check.  
11 The Jury Commissioner's office is a little short-handed, but  
12 we'll double check, make sure we can get those to you as soon  
13 as we can.

14           I understand you talked about marking exhibits with  
15 the clerk and have that tentatively scheduled. Do you  
16 anticipate using the exhibits from the last trial?

17           MR. YOUNG: I believe that would be the request. I  
18 don't know. Again, counsel and we will talk and try to iron  
19 that out. I think we can agree to that. I don't know,  
20 frankly, we will need all of the exhibits that were previously  
21 admitted, but any either side would like to admit it makes  
22 sense to me to use what was originally admitted and we can  
23 supplement that with anything that is required.

24           THE COURT: So, hopefully, if we are going to use

1 the same exhibits, it would be best if we just utilized the  
2 same markings on the exhibits as when marked before. So  
3 because that was a joint trial, we still have those other two  
4 defendants. We may at some point need to review the record.  
5 I don't really want to be taking numbers off and adding  
6 numbers. We'll give, every document or exhibit that was  
7 marked previously, will be given the exact same number.

8 MS. PUSICH: I agree with that depending what we  
9 decide to use in this case. Because they aren't retrying, and  
10 there may be gaps in the numbers, we may request a  
11 supplemental Instruction that tells them not to concern  
12 themselves with numbers so they are not asking for things we  
13 haven't put before them.

14 THE COURT: Actually, in civil cases, we have lots  
15 of gaps in numbers. Jurors usually don't get too concerned  
16 about that. But we can certainly look at that and get to it  
17 if you are concerned.

18 MS. PUSICH: Thank you.

19 THE COURT: Okay. That is kind of the preliminary  
20 business we have. We have the Instructions you have all  
21 provided to me. And I really, I didn't see a lot of  
22 objections, so do we want to start with the State's proposed  
23 Instructions?

24 MR. YOUNG: Your Honor, I apologize. I did not



1 bring ours. I know you had discussed setting a hearing today  
2 to discuss the burden of proof or if there is one.

3 THE COURT: Right.

4 MR. YOUNG: I recall, I thought we were settling  
5 Jury Instructions at the conclusion of the State's case. I  
6 don't have those in front of me right now. I know the  
7 majority of the Instructions that the defense offered are  
8 either identical or very similar to what the State offered. I  
9 do recall the first one or two proposed Instructions from the  
10 defense go through a discussion of mitigating circumstances.  
11 Because this is no longer a death penalty case, I am not sure  
12 if that is necessary. I think, certainly, the defense can  
13 obviously argue all the mitigating circumstances they feel  
14 justifies a sentence less than life without possibility of  
15 parole, but as far as specifically listing all what the  
16 mitigating circumstances are and they have to find those, I am  
17 not sure that is necessary based on the structure of the case.  
18 One of them, in fact, one of the mitigating circumstances  
19 discusses something about the death penalty. I can't remember  
20 exactly what it was. Again, obviously, that is not  
21 appropriate at this time since it is no longer an option. If  
22 I could take a look at Ms. Pusich's Instructions, I could be a  
23 little more specific. I apologize not bringing those with me  
24 today.

1 THE COURT: You can approach. I have some.

2 MR. YOUNG: Sure. Thank you.

3 MS. PUSICH: I will check with Mr. Young in a  
4 moment, but it occurs to me my trial statement and proposed  
5 Instructions were filed with the court and he has them.  
6 However, it appears the Points and Authorities were filed in  
7 camera, so he may not have them.

8 THE COURT: I saw that. I saw you filed them.

9 MS. PUSICH: I think probably before we go too far,  
10 I should make sure he gets a chance to read this.

11 THE COURT: Why don't we do this: We'll go ahead  
12 and postpone the discussion on the mitigating Instructions.  
13 Right now I think it is important for the State to review your  
14 memo then have an opportunity to let me know what their  
15 position is on those Instructions so we can deal with that.  
16 We have a little bit of a problem next week. We are in  
17 another pretty intense trial. It is a Habeas trial, but it is  
18 all week, and it involves the death penalty.

19 MS. PUSICH: I remember it, Your Honor.

20 THE COURT: So I guess we'll try to squeeze you in  
21 as we can. We want to make sure we are able to be prepared  
22 and ready to go.

23 MS. PUSICH: Your Honor, I think there are two  
24 things unresolved that are fairly large issues. It is the

1 State's position they really have no burden of proof  
2 whatsoever, and the jury has no parameters to their exercise  
3 of discretion. I disagree with that. That is what I put in  
4 the Points and Authorities. That has to be resolved or we'll  
5 be stepping over each others toes and getting into trouble.

6 The other is we don't have a ruling whether or not  
7 the jury is going to be advised of the co-defendants. That is  
8 a fairly major issue for all of us.

9 THE COURT: I am working on that. Unfortunately, my  
10 gut may not be following the law. I'm really weighing that  
11 circumstance. I am very concerned about the issue of  
12 relevance and undo influence on the jury, but I am also very  
13 concerned about not giving a clear picture to the jury,  
14 because this is very awkward as it is, 15 years later, to not  
15 be able to discuss that at all. I want to be fair to both  
16 sides. So we have a draft order, but I am still, I am still  
17 thinking about it. And, actually, this morning, I asked to  
18 find some more authority. We are going to look at more  
19 analyses done in the 9th Circuit so I can see other ways the  
20 judges have looked at it and how they thought about it. I  
21 will get that decision to you.

22 MR. YOUNG: I won't address the co-defendants at  
23 this point. What has been broached as far as the standard and  
24 Ms. Pusich's comment about no parameters, I don't know if Your

1 Honor wants me to file a response or opposition to Ms.  
2 Pusich's brief.

3 THE COURT: I think you probably should. She has  
4 the issues in writing.

5 MR. YOUNG: I can certainly do that. I won't  
6 address it at this point.

7 THE COURT: You can certainly tell me what you are  
8 thinking.

9 MR. YOUNG: Very simply, the parameters, it is not  
10 there are no parameters. The parameters, both proposed Jury  
11 Instructions I think are going to suggest, is that we advise  
12 the jury of one of three options, life without, life with 20  
13 or a definite term of fifty with parole eligibility after  
14 twenty. Those are the parameters. It is not they choose  
15 whatever they want.

16 The question of burden of proof goes to the guilt  
17 phase which, again, is not an issue for this hearing. The  
18 defendant's guilt has not been disturbed. It is simply just  
19 essentially like taking the exception of the death penalty  
20 sentence out of it. The only issue is what is a fair and  
21 appropriate sentence. So there is no burden of proof for the  
22 State to carry in that regard. That, in a nutshell, is what  
23 the State's position is. The parameters are the three options  
24 set forth by statute. But I will get something on file. I

1 will do my best to get that on file today. At worst, we'll  
2 get it on file Tuesday morning for you.

3 THE COURT: All right. That will be fine. Okay.  
4 So I guess we are not really ready to talk about that today in  
5 anymore depth. Ms. Pusich.

6 MS. PUSICH: Your Honor, I will wait to see their  
7 response. I will try and make sure, if it requires any  
8 response from me, I put that also in writing as quickly as  
9 possible. I know we are getting very close. Although we  
10 tried to clear our calendars to the extent we can, I am not  
11 sure you have the same luxury next week. If I might suggest,  
12 I don't know what everybody's schedule looks like, we reserve  
13 a little bit of time before we bring the jury into the room to  
14 make sure each of us knows exactly what the rules are going to  
15 be.

16 THE COURT: Okay. I think we have another problem.  
17 We pride ourselves in being able to manage our calendars and  
18 do all of this, yet we still have a very difficult week next  
19 week before I start. So I don't know how this happened, but  
20 we have a two-hour sentencing currently scheduled for January  
21 26th at 9:00 a.m. so the jury is being called for 1:00, so our  
22 thought is that we will have between 10:00 and 1:00 to  
23 finalize any housekeeping matters that we have in this case.  
24 I am sorry, 11:00 and 1:00. That's right. 9:00. Two hours.

1 We will have that window to finalize some things. But we  
2 also, I would like to try to find some time next week to get  
3 together. So what we'll do, I still do not have the order of  
4 witnesses for that Habeas going on next week. We got it, but  
5 I haven't seen it. We are going to look at that list, see if  
6 there is some time. Did you see any gaps?

7 (Whereupon the clerk and the Court had a  
8 discussion.)

9 THE COURT: It looks to me there will be some time  
10 in the afternoon on Tuesday or Wednesday based on those  
11 witnesses and the way they are appearing. So I think Tuesday  
12 or Wednesday afternoon I think we will have some time. But I  
13 won't know until I visit with the attorneys on the case. So  
14 maybe we should just tentatively look at Wednesday afternoon.  
15 With the three-day weekend, I won't necessarily be getting  
16 anything from you till Tuesday. That would give Ms. Pusich an  
17 opportunity to look at what you will have and get it from the  
18 State. Maybe we should tentatively try for 3:00 o'clock  
19 Wednesday afternoon.

20 MS. PUSICH: Thank you, Your Honor.

21 THE COURT: Then we'll certainly let you know if for  
22 some reason that is not going to work, but that should be  
23 okay.

24 MS. PUSICH: That will help us prepare within the

1 bounds of whatever orders the Court enters.

2 THE COURT: We should have an order for you by  
3 Tuesday on the co-defendants. That is our project this  
4 weekend, too. We are all working on the case with you. Soon  
5 as you get the information to me, then we'll make a decision.

6 MR. YOUNG: Because of that, I will do my absolute  
7 best to get that. It will be a short brief. I will get that  
8 out today.

9 THE COURT: Okay. Now when you looked over the  
10 Instructions that were provided by the defense, did you have  
11 any issues with those except for what you talked about?

12 MR. YOUNG: No. Again, the majority of them were  
13 very consistent between the parties in what we already  
14 discussed. I am not sure it is necessary, but in particular,  
15 I will address that as well.

16 THE COURT: Ms. Pusich, with regard to the  
17 Instructions the State provided to you, did you have an  
18 objections generally?

19 MS. PUSICH: Your Honor, I am not sure I have the  
20 State's, but I will be happy to make sure.

21 THE COURT: Okay. All right. Because I think most  
22 of them were given in the other case. When we reviewed them,  
23 they looked like they were very stock Instructions. I would  
24 like you to look at them and make sure there is nothing there

1       that you want to talk about.

2               MS. PUSICH:  If there is, I will try and put that in  
3       my written response after I get his brief.

4               THE COURT:  Okay.  That will work.  So in terms of  
5       the witnesses, I would like to kind of get a sense where we  
6       are going, when witness are going to be here and which people  
7       are going to be witnesses.  Do you have that?

8               MR. YOUNG:  We have been working on that.  We are  
9       going to get something on file with the court.  I don't think  
10      it is necessary -- Frankly, I know we are set for two weeks.  
11      I think we will finish well before then.  I know, again, this  
12      is very rough, deputy Payne, Candi Payne.  Ron Holtz.  They  
13      both testified at the original trial.  There will be Jerome  
14      Vaughn.  He was the road boss, if you will.  We have confirmed  
15      he's since deceased, so we have his transcript.  It was  
16      relatively short, but we intend on presenting his transcript  
17      in lieu of his live testimony.  Doctor Palazzari, the Coroner.  
18      He will be testifying, but it would be, again, very brief.

19              From the Churchill County related case shooting,  
20      Abraham Lee.  Billy Coleman.  Mark Joseph.  And Jim Steuart,  
21      Stuart is spelled S-T-E-U-A-R-T.

22              And then with respect to the local case, beyond the  
23      witnesses already stated, it would be Jim Beltron,  
24      B-E-L-T-R-O-N.  Charles Lowe, L-O-W-E.  Kevin Lattyak,



1 L-A-T-T-Y-A-K. He's now employed in Ohio and unavailable for  
2 that week, so that may be, again, he testified previously,  
3 that may be a transcript that is introduced. I will again  
4 notify counsel what I intend on. Lynette Bagby who is now  
5 Lynette Anderson who actually testified at the hearing. We  
6 understand the Court's ruling the majority of what she said is  
7 not admissible, but she's the gal who read the letter from  
8 Mr. Harte. We are, frankly, going to keep it limited to her  
9 receipt of that basic background.

10 As far as family members of Mr. Castro, there will  
11 be several in attendance, but my understanding is that one of  
12 Mr. Castro's brothers will be reading a statement. There is a  
13 couple of pictures that I am working on obtaining from the  
14 family we'll get to counsel immediately. So, candidly, Your  
15 Honor, without holding my feet to the fire, I would like to  
16 think that we are done with our case in that first week. I  
17 think that is a very probable timeline.

18 THE COURT: Okay. And you will provide readers for  
19 the transcripts?

20 MR. YOUNG: In the trial statement I did put in  
21 there we would provide readers. I will discuss with Ms.  
22 Pusich on the front end which people specifically we are  
23 planning on using. Obviously, Mr. Vaughn we have to. As far  
24 as Mr. Lattyak, we are frankly open to having him testify in

1 person, but it doesn't look like that is a possibility.  
2 Beyond those two, those are the only two I anticipate. There  
3 was a Mr. Machado and Mr. Lagama who basically set the scene  
4 at the residence right outside where the cab was being  
5 located. I don't anticipate reading in their transcript, but  
6 deputy Payne is basically going to summarize a couple of  
7 comments they made as far as time. Again, we are going to  
8 finalize today, make sure there is nobody else, but that  
9 appears to be it from the State's case.

10 THE COURT: Okay. Ms. Pusich.

11 MS. PUSICH: As I indicated in the trial statement,  
12 we previously noticed Dr. Piasecki as my expert. She's  
13 available except on January 28th which is the Wednesday. It  
14 doesn't sound like they will be finished by then. We will  
15 advise the Court, just in case. We filed our notice of  
16 witnesses this morning. One document is a letter we noticed  
17 by the person. If the State wants to talk to them they can.  
18 He won't be here. He's an inmate in Ely. One is the  
19 transcript of my client's mother who has since died. She was  
20 put under oath at the earlier trial, was subject to  
21 cross-examination so it is prior sworn testimony. Then we  
22 have character witness, a friend of Mr. Harte's who will be  
23 present.

24 THE COURT: Okay. Just to let you know, we do have

1 the original transcripts. If you are going to use the  
2 transcript, we can use the certified copies for the readers,  
3 etcetera. I wanted you to know we have the original  
4 transcripts. They have been all imaged, but we also have  
5 paper.

6 MS. PUSICH: Ms. Solomon speaks, is asked about the  
7 death penalty. I will speak to the State. We plan to redact  
8 that.

9 THE COURT: That's a good idea. So it looks like  
10 the first week we will be providing -- My criminal calendar  
11 will go to someone else. We'll basically be here 9:00 to 5:00  
12 with whatever breaks we need to take. With that said, we  
13 should be able to get through the majority, I think, of your  
14 witnesses that week.

15 MS. PUSICH: Your Honor, Friday until noon?

16 THE COURT: Friday we have got one problem. We  
17 aren't going to be able to go until noon if we need to do  
18 Friday. If we decide we can skip Friday, we can skip Friday.  
19 My husband is having surgery that morning. I thought we could  
20 sort of flip flop the day and start with the jury at 1:00 if  
21 we feel we need to. We'll still have half a day on Friday.  
22 Friday would be starting at 1:00 o'clock instead of 9:00  
23 o'clock. The other four days will be the full schedule.  
24 We'll pick the jury in the afternoon on the 26th and have all

1 day on the 27th, all day on the 28th, all day on the 29th and  
2 then half a day on the 30th.

3 MS. PUSICH: But on the 26th, we should be prepared  
4 to be here at 11:00.

5 THE COURT: Right. On the second, we have the  
6 entire day Monday the 2nd. Based on what we are looking at,  
7 with that half day and the witnesses on the State's case, I  
8 wouldn't be surprised if you shouldn't have your witnesses  
9 here on Monday and make that the day for the defense. Then I  
10 suspect we will do closings and deliberations on the 3rd,  
11 because we'll want to finalize the Instructions, and the jury  
12 is here all day listening to witnesses. I probably won't have  
13 them deliberate late Monday, probably bring them back on  
14 Tuesday morning that is kind of what I am thinking based on  
15 what you have given me. Of course, if we start going a lot  
16 faster, we'll fix that, but that is the schedule. Does that  
17 work for everybody?

18 MS. PUSICH: Yes, ma'am.

19 THE COURT: So any other business we can do today?

20 MR. YOUNG: The only other thing I can think of,  
21 Your Honor, I spoke with counsel very briefly this morning  
22 about this, this is the first re-sentencing I have done in  
23 front of a jury.

24 THE COURT: Me to in 23 years.

1           MR. YOUNG: We'll talk about it together then. In  
2 any event, I did speak with counsel about the order, because  
3 the statute is very clear that the victim or in this case  
4 family of the victim gets the last word. And so what Ms.  
5 Pusich advised me, she has done a re-sentencing before and  
6 after Instructions are read and arguments are made, there is  
7 no evidence taken after that. So what we had discussed, I  
8 don't know what the Court's intention is, while typically in a  
9 sentencing hearing there are no opening statements made, we  
10 would both request we be allowed to make opening statements  
11 just to give the jury a heads up what they will expect to  
12 hear. That the State would put on effectively its case or the  
13 evidence. That the defense would then be able to put on its  
14 case and evidence. That the defendant, if he chooses, would  
15 be allowed to address the jury, and that after that, that the  
16 family would be able to address the jury per statute having  
17 the last word, at which point at the conclusion of that would  
18 be Jury Instructions and closing arguments. I think that is  
19 what the parties would suggest. But, obviously, I am open to  
20 the Court's views to the contrary. The only wild card would  
21 be any sort of rebuttal cases for both the State and the  
22 defense. It is simply based on some of the information,  
23 mainly from Dr. Piasecki. I do have her report. Counsel  
24 forwarded that to us. There may be a need for a rebuttal case

1 just on a couple of minor points. So that would be the only  
2 thing. I may ask leave of the Court if that came about  
3 allowing the State to put on a brief rebuttal case. But I  
4 don't know that until the time arises. I think we are all in  
5 agreement basically on that format if the Court is agreeable  
6 to it with the one exception of a rebuttal case.

7 THE COURT: You are talking opening statements, your  
8 case, the Defendant's case, if necessary, a rebuttal case,  
9 then a statement of allocution by the defendant if he chooses  
10 to make it or testimony, but it would be his choice. If he  
11 wasn't to testify, I think that has to be in your  
12 case-in-chief.

13 MS. PUSICH: I agree.

14 THE COURT: If he wants to make a statement of  
15 allocution, make that statement, then the family could read  
16 their letter, then immediately Jury Instructions and closing.  
17 Is that what you are saying?

18 MR. YOUNG: That's correct. If rebuttal is  
19 necessary, worked in after the defense case, correct.

20 THE COURT: Right. It would be after the defense  
21 case but before the statement of allocution.

22 MR. YOUNG: That's correct.

23 THE COURT: All right. That is fine with me. I  
24 don't have a problem with that. If you have a letter from the

1 brother, we should mark that.

2 MR. YOUNG: They actually sent it to me late last  
3 night. I haven't had a full time to review it. There is a  
4 couple of things in there where, I don't like having them  
5 change their letters, a couple of things I am probably going  
6 to have them take out. Specifically, there is a comment no  
7 one's getting out of prison. Since that is the very issue  
8 here, I am going to ask they remove that. Again, I will get  
9 that to counsel as soon as they make that minor correction.  
10 There is a couple, I think four photographs that were  
11 provided. I will get that to counsel as well.

12 THE COURT: Now what about an Instruction, we need a  
13 limiting Instruction with regard to the evidence that I did  
14 say could come in. I had asked the State to provide an  
15 Instruction.

16 MR. YOUNG: The other act evidence Instruction?

17 THE COURT: Yes.

18 MR. YOUNG: I will get that. If I can just e-mail  
19 that to your chambers and Ms. Pusich, I will do that today.

20 THE COURT: That's fine. I just want to make sure  
21 those two things we really need. I would like to have them,  
22 make sure. All right. When you are doing that, in case I  
23 rule in your favor, and I don't know what I am going to do on  
24 the prior, the other defendants, you should prepare an

1       Instruction in that regard, too.

2               MR. YOUNG:   Since I am so optimistic it will be  
3       admitted, I did actually provide one in my proposed  
4       Instructions, I believe the very last one.   Obviously, if you  
5       rule against the State, obviously, we can remove that one.  
6       There was one provided.

7               THE COURT:   Okay.   Anything else for this morning?

8               MR. YOUNG:   I think that's it, Your Honor.   Thank  
9       you.

10              MS. PUSICH:   Your Honor, the only other thing, it is  
11       my understanding Mr. Harte has been brought to Washoe County.  
12       When he finishes, he will be maintained here.   Certainly we  
13       make that request so we can use him next week to prepare.

14              THE COURT:   Right.   It is my understanding he will  
15       be booked into the jail after this hearing and remain there  
16       until the end of the trial.

17              All right.   Then we didn't get to do as much as we  
18       thought we would do here today, but we have got a little bit  
19       of a better idea.   We are very close to being resolved.   You  
20       can carve out that time Wednesday afternoon.   If not that day,  
21       well find another time and do the best we can.

22              MS. PUSICH:   Thank you, Your Honor.

23              THE COURT:   Court's in recess.

24              (Whereupon, the proceedings were concluded.)



1 STATE OF NEVADA, )  
2 ) ss.  
3 COUNTY OF WASHOE. )  
4

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

8 That as such reporter I was present in Department NO. 4 of the  
9 above-entitled court on Friday, January 16, 2015, at the hour  
10 of 9:15 a.m. of said day and that I then and there took  
11 verbatim stenotype notes of the proceedings had in the matter  
12 of THE STATE OF NEVADA vs. SHAWN HARTE, Case Number  
13 CR98-0074A.

14 That the foregoing transcript, consisting of pages numbered  
15 1-23 inclusive, is a full, true and correct transcription of  
16 my said stenotypy notes, so taken as aforesaid, and is a full,  
17 true and correct statement of the proceedings had and  
18 testimony given upon the trial of the above-entitled action to  
19 the best of my knowledge, skill and ability.

20 DATED: At Reno, Nevada this 17th day of January, 2015.  
21  
22

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

1 CODE:  
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7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
8 IN AND FOR THE COUNTY OF WASHOE

9 THE STATE OF NEVADA,  
10 Plaintiff,

Case No. CR98-0074A

11 vs.

Dept. No. 4

12 SHAWN R. HARTE,  
13 Defendant.

14 **ORDER GRANTING MOTION IN LIMINE TO ADMIT EVIDENCE OF CO-**  
15 **DEFENDANTS' SENTENCES DURING PENALTY PHASE & DENYING**  
16 **DEFENDANT'S MOTION IN LIMINE**

17 On March 19, 1999, a jury found Defendant Shawn R. Harte (hereinafter "Harte") guilty  
18 of Robbery and Murder. After a penalty hearing the Court rendered a judgment against Harte on  
19 May 7, 1999. Harte was sentenced to Death for the Murder conviction, and ordered imprisoned  
20 in the Nevada Department of Prisons for the maximum term of one hundred and eighty (180)  
21 months with the minimum parole eligibility of seventy-two (72) months with credit for five  
22 hundred and forty-one (541) days, time served, for the Robbery conviction. *Affirmed, State v.*  
23 *Harte*, 120 Nev. 1043 (2004). Subsequently, during post-conviction, relying upon *McConnell v.*  
24 *State*, this Court affirmed the guilty verdict against Harte, but vacated Harte's death sentence.  
25 The Court's ruling was affirmed by the Nevada Supreme Court. *State v. Harte*, 124 Nev. 969  
26 (2008). Ultimately, the United States Supreme Court declined to review the matter. A new  
sentencing hearing concerning the Murder conviction for Harte, has been scheduled for January  
26, 2014.

1           On September 18, 2014, the State of Nevada (hereinafter "State"), filed *Motion in Limine*  
2 *to Admit Evidence of Co-Defendants' Sentences During Penalty Phase*. Harte filed *Opposition*  
3 *to Motion in Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase* on  
4 October 1, 2014. On October 8, 2014, the State filed *Reply to Defendant's Opposition to State's*  
5 *Motion in Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase*.  
6 Similarly, Harte filed *Motion in Limine Regarding Individualized Sentencing* on September 18,  
7 2014. On September 29, 2014, the State filed *Opposition to Motion in Limine Regarding*  
8 *Individualized Sentencing*. Harte filed *Reply in Support of Motion in Limine Regarding*  
9 *Individualized Sentencing* on October 8, 2014. On December 17, 2014, the Court heard oral  
10 argument on the Motions and took the matter under advisement. The Motions were argued  
11 together; thus, the Court will discuss the Motions as one.

12           The State seeks to admit evidence that Harte's co-defendants Weston Edward Sirex and  
13 Latisha Marie Babb (hereinafter and collectively "co-defendants"), were jointly tried with Harte.  
14 Additionally, the State seeks to admit evidence that Harte's co-defendants received sentences of  
15 Life Without the Possibility of Parole. The State argues evidence of the sentences imposed on  
16 the co-defendants is admissible against Harte during his penalty phase. The State contends this  
17 evidence is relevant and should be admitted, as few limitations are imposed upon a Judge's right  
18 to consider evidence in imposing a sentence. The State argues that the evidence of the co-  
19 defendants' sentences does not take away the personalized sentence for Harte, and is not unfair  
20 to Harte, based on the broad limits for admissibility of evidence under NRS 175.552. Lastly, the  
21 State admits that should the Court allow for introduction of the sentences imposed upon the co-  
22 defendants, the State would not oppose a jury instruction articulating that the jury may consider  
23 the sentences imposed upon the co-defendants, but such sentences are not binding.

24           Harte argues that he must be sentenced individually. Harte asserts that evidence for  
25 sentencing is limited to evidence which bears on the defendant's personal responsibility and  
26 moral guilt. Harte argues the sentences of the co-defendants are based on separate individualized

1 facts. As such, Harte contends the sentences of the co-defendants do not reflect upon Harte's  
2 responsibility. Harte posits that the prejudicial effects of allowing the co-defendants' sentences  
3 to be used against Harte would lead to an egregious result, because it would take away the  
4 personalized sentence that Harte deserves and would allow the jury to focus on proportionality  
5 between co-defendants. Harte asserts that if the evidence of the co-defendants' sentences are  
6 admitted, the jury will be basing Harte's sentence not upon Harte's involvement in the crime,  
7 background and personal participation. Rather, Harte asserts that the jury will be basing Harte's  
8 sentencing upon the sentences of the co-defendants. Additionally, Harte argues allowing this  
9 evidence to be admitted would set a dangerous precedent for future cases because it will punish  
10 defendants who have a trial later than a co-defendant. Lastly, Harte asserts that sentences  
11 received by others cannot and do not reflect on Harte's blameworthiness.

12 During a penalty hearing for the crime of Murder of the First Degree, evidence may be  
13 presented concerning matters "which the court deems relevant to the sentence, whether or not the  
14 evidence is ordinarily admissible." NRS 175.552(3). Pursuant to NRS 48.015 relevant evidence  
15 "means evidence having any tendency to make the existence of any fact that is of consequence to  
16 the determination of the action more or less probable than it would be without the evidence."  
17 Additionally, "[t]he decision to admit particular evidence during the penalty phase is within the  
18 sound discretion" of the Court. McKenna v. State, 114 Nev. 1044, 1051 (1998). Sentencing is  
19 an individualized process; therefore, no rule of law requires a court to sentence co-defendants to  
20 identical terms. Nobles v. Warden, Nevada Dept. of Prisons, 106 Nev. 67, 68 (1990). A court  
21 may admit evidence of co-defendant sentences, if the court finds such evidence proper and  
22 helpful to the jury. Flanagan v. State, 112 Nev. 1409, 1422 (1996) *distinguished by* Evans v.  
23 State, 117 Nev. 609, 639-640 (2001) (finding Flanagan to be distinguishable because Evans did  
24 not involve codefendants all convicted of murder or manslaughter in regards to the same  
25 homicides).

26 ///

1 Several courts have found that although a trial court is not necessarily precluded from  
2 allowing consideration of co-defendant sentences, a trial court does not commit constitutional  
3 error by refusing to allow such evidence. See Beardslee v. Woodford, 358 F.3d 560, 579 (9th  
4 Cir. 2004) supplemented sub nom. Beardslee v. Brown, 393 F.3d 1032 (9th Cir. 2004). Unlike  
5 cases where courts have found co-defendant sentences not relevant, Harte's co-defendants were  
6 all charged with the same offenses in the same case as Harte, and this case involved varying  
7 degrees of participation between the defendants.

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

17 The jury will be instructed that it is not bound by the previous sentences given to the co-  
18 defendants. Further, the jury will be instructed that it is their duty to sentence Harte based upon  
19 his personal responsibility, his involvement in the crime, and his background. Therefore, the

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 Court will admit evidence of Weston Edward Sirex and Latisha Marie Babb being sentenced to  
2 Life Without the Possibility of Parole.

3 Based on the foregoing and good cause appearing,

4 IT IS HEREBY ORDERED that Plaintiff THE STATE OF NEVADA's Motion in  
5 Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase is GRANTED.

6 IT IS HEREBY FURTHER ORDERED that Defendant SHAWN R. HARTE's Motion in  
7 Limine Opposing Admissibility is DENIED.

8 Dated this 21 day of January, 2015.

9 Connie J. Steinheimer  
DISTRICT JUDGE

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR98-0074A

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the  
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 21 day of January, 2015, I filed  
5 the **ORDER GRANTING MOTION IN LIMINE TO ADMIT EVIDENCE OF CO-**  
6 **DEFENDANTS' SENTENCES DURING PENALTY PHASE & DENYING**  
7 **DEFENDANT'S MOTION IN LIMINE** with the Clerk of the Court.

8 I further certify that I transmitted a true and correct copy of the foregoing document by  
9 the method(s) noted below:

10        **Personal delivery to the following: [NONE]**

11   X   **I electronically filed with the Clerk of the Court, using the ECF which sends an**  
12 **immediate notice of the electronic filing to the following registered e-filers for their review**  
13 **of the document in the ECF system:**

14 MAIZIE WHALEN PUSICH, ESQ., for SHAWN RUSSELL HARTE

15 MATTHEW LEE, ESQ. for STATE OF NEVADA

16 JEREMY T. BOSLER, ESQ. for SHAWN RUSSELL HARTE

17 CHERYL BOND, ESQ. for SHAWN RUSSELL HARTE

18 ZACH YOUNG, ESQ. for STATE OF NEVADA

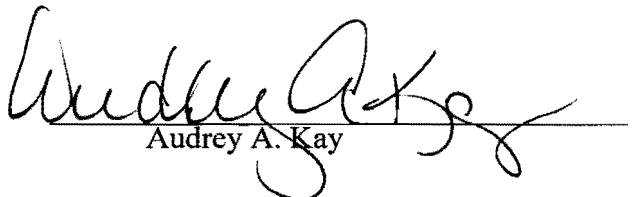
19        **Deposited in the Washoe County mailing system in a sealed envelope for postage**  
20 **and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

21        **Placing a true copy thereof in a sealed envelope for service via:**

22        Reno/Carson Messenger Service – [NONE]

23        Federal Express or other overnight delivery service [NONE]

24 DATED this 21 day of January, 2015.

25   
Audrey A. Kay

4185

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

STATE OF NEVADA,

Dept. No. 4

Plaintiff,

Case CR98-0074A

vs.

SHAWN HARTE, ET AL,

Defendants.

Pages 1 to 54, inclusive.

TRANSCRIPT OF PROCEEDINGS

RESOLUTION OF OUTSTANDING MATTERS  
PRIOR TO JURY TRIAL COMMENCING  
Wednesday, January 21, 2015

A P P E A R A N C E S:

FOR THE PLAINTIFF:

Zachary Young  
Deputy District Attorney  
1 So. Sierra St., So. Tower  
Reno, NV 89502

FOR THE DEFENDANT:

Maizie Whalen Pusich  
Public Defender  
350 So. Center Street  
Reno, NV 89520

REPORTED BY:

Christina Amundson, CCR641  
Molezzo Reporters, 322.3334



1 RENO, NEVADA -- WEDNESDAY, JANUARY 21, 2015

2 -o0o-

3 THE COURT: Thank you. Please be seated.  
4 Let the record reflect that the defendant is present  
5 with counsel and the State's present.

6 The Court has entered an order with regard  
7 to the co-defendant's sentences and I am going to  
8 let that in. So that being said, we need to move on  
9 with a few other things, one being the instruction  
10 that's being proposed. And as I understand it, you  
11 want the instruction that says, "I will now instruct  
12 you on the timeline of this case," that you want  
13 that instruction read as the jury comes in to begin.

14 MS. PUSICH: Your Honor, it's the State's  
15 proposed instruction. We've changed a little bit of  
16 language between us, but I think that that is the  
17 timing that we had in mind, that they would know  
18 from the very beginning.

19 THE COURT: Okay. And have you read the  
20 proposal? This was going to be our written  
21 instruction but it was going to be said by me at the  
22 beginning of the trial, that everyone agrees that  
23 this language and this content is appropriate given  
24 the new trial.

1 MS. PUSICH: Correct, your Honor. The  
2 State has provided a written copy to us and I  
3 believe to the Court as well where he has some  
4 changes that he's made by interlineation, so this  
5 would be cleaned up before it's given to the jury.

6 The language that we are agreeing to is, "I  
7 will now instruct you on the timeline of this case.  
8 The defendant, Shawn Russell Harte, committed the  
9 crimes of murder with the use of a deadly weapon and  
10 robbery with the use of a deadly weapon on  
11 October 26th, 1997. The defendant pled not guilty  
12 and the matter proceeded to a jury trial. The jury  
13 found the defendant guilty beyond a reasonable doubt  
14 of both charges on March 24<sup>th</sup>, 1999.

15 "This Court has ordered a sentencing  
16 hearing for the murder conviction, which is why you  
17 were brought to court today. You are called upon to  
18 decide the sentence for the murder conviction only.  
19 I instruct you not to consider or concern yourselves  
20 with the reasons for the delay between the trial in  
21 this case and the sentencing."

22 THE COURT: Okay. And I think the language  
23 he changed was instead of a period after "matter  
24 proceeded to jury trial." He had "and a jury found

1 the defendant."

2 MS. PUSICH: Correct, your Honor. He took  
3 the date out of the actual conviction. We don't  
4 think that's particularly important for them. And  
5 then he added a qualifying clause at the end of line  
6 9 to remind them again they're sentencing only for  
7 the murder.

8 THE COURT: Okay. So I can read that -- I  
9 don't anticipate the jury ever receiving this  
10 instruction.

11 MS. PUSICH: Okay.

12 THE COURT: I thought I would just read it  
13 at the beginning of the trial.

14 Does everyone agree with that?

15 MS. PUSICH: That's fine, your Honor.

16 MR. YOUNG: Yes.

17 THE COURT: So ultimately when we have a  
18 clean one and I actually read it, I'll provide it to  
19 the clerk and she'll mark it as a Special  
20 Instruction--

21 THE CLERK: A.

22 THE COURT: -- A.

23 MR. YOUNG: And the interlineations we're  
24 just in agreement between myself and counsel, so I

1 will get a clean copy emailed to the Court and  
2 counsel tomorrow morning.

3 THE COURT: Okay. That will be fine.

4 And then we also have the proposed limiting  
5 instruction with regard to the other act evidence  
6 out of Churchill County. And have you both had an  
7 opportunity to review this instruction which starts  
8 with, "You have heard evidence"?

9 MS. PUSICH: We have, your Honor.  
10 Mr. Young provided that to us and actually made a  
11 change at our request. So what has happened is he  
12 originally drafted this looking toward the incident  
13 that will be described by the witnesses from  
14 Churchill County and then realized he said, in  
15 reviewing the defendant's conversation with  
16 Detective Beltran, that he actually made reference  
17 to a couple of other things.

18 I told the State that, rather than going  
19 through a laundry list of everything, because the  
20 other is a relatively short reference in passing,  
21 that I would prefer to include, "or any other crime  
22 than murder," which he has done.

23 And then the other question that we had --  
24 and I understand the State won't stipulate to it but

1 won't object to it -- is I would prefer at line 9  
2 that the last word not be "propensities." That to  
3 me comes across as nails on a chalkboard in a  
4 courtroom. I would propose that we change that to  
5 "qualities," please.

6 MR. YOUNG: Your Honor, again the  
7 interlineation that you have -- and, again, I'll  
8 provide a clean copy by way of email -- was an  
9 agreement after discussion with counsel. The  
10 language -- I effectively mirrored as best I could  
11 the Denson language, which I provide in that cite.  
12 It uses -- Denson uses "propensities" ending with  
13 "mental or moral propensities," so that, frankly, is  
14 the way Denson reads.

15 However, since the defense is specifically  
16 requesting we change that to "qualities," I don't  
17 have any objection. I just want the record clear  
18 that it's the defense's request to make that change,  
19 but I have no objection. I'll make that change as  
20 well, if that's what the Court orders.

21 THE COURT: And you're making this request  
22 as a tactical decision?

23 MS. PUSICH: Your Honor, we are. I think  
24 that 48.045 and 175.552 contemplate that we're not

1 going to be using "propensity"-type language. It  
2 caught my attention. And although Denson used it,  
3 it wasn't in the context of a jury instruction. It  
4 was a court determination.

5 THE COURT: So I have no problem changing  
6 it to "qualities" based on the defendant's request.

7 MS. PUSICH: Thank you, your Honor.

8 THE COURT: So as we review the jury  
9 instructions that have been proposed, I think we're  
10 down to three instructions and maybe the sympathy  
11 instruction. So we have the three instructions that  
12 the State is objecting that the defense offered,  
13 which I can lump together as mitigating  
14 instructions. And then the defense is objecting to  
15 the instruction with regard to sympathy not being  
16 part of their determination.

17 And you say "two," so can you give me the  
18 specific two that you're concerned about?

19 MS. PUSICH: I can, your Honor. Just a  
20 moment, please. One, obviously, is -- I believe  
21 it's the second instruction the State proposes that  
22 says that "Your verdict should not be based on," and  
23 it includes the word "sympathy." And that's the one  
24 normally characterized as an anti-sympathy

1 instruction. The other one talks about "equal and  
2 exact justice," and I think that maybe that's the  
3 second to the last.

4 THE COURT: Okay. So we're talking about  
5 the instruction that says, "Although you are to  
6 consider only the evidence in the case in reaching a  
7 penalty verdict, you must bring to the consideration  
8 your everyday common sense," et cetera.

9 MS. PUSICH: Yes.

10 THE COURT: And then it says, "A penalty  
11 verdict may never be influenced by sympathy,  
12 passion, prejudice or public opinion."

13 MS. PUSICH: Correct.

14 THE COURT: Okay.

15 MS. PUSICH: Your Honor, I think that those  
16 -- I'll address them separately. The specific  
17 sympathy instruction has been approved in earlier  
18 Nevada cases but only when it was also given with an  
19 appropriate mitigation instruction, and those are  
20 the two citations that I put Leonard and Leslie.

21 And at the time that we were first talking  
22 I didn't have the State's instructions, so I didn't  
23 know that first they were filing a brief that says  
24 they wanted no mitigation instructions, but they

1 still were proposing anti-sympathy instructions. I  
2 think that the Nevada Supreme Court has made it very  
3 clear that, if the jury is going to hear what I'm  
4 characterizing and what they have called an  
5 anti-sympathy instruction, this jury must also be  
6 given some information on mitigation.

7           It may not be the individualized list that  
8 we've proposed, but I think at the very least they  
9 must be given an instruction that tells them what  
10 mitigating evidence is and that they should consider  
11 it. Then, your Honor, with respect to the second --

12           THE COURT: Okay. Let's just talk about  
13 this, though. You don't have an objection to this  
14 instruction if you're allowed a mitigation  
15 instruction that says that they can consider  
16 mitigation evidence.

17           MS. PUSICH: Correct, and tells them what  
18 it is, your Honor. I don't think that that's the  
19 sort of thing that's bandied about in standard  
20 conversation. I think that it's an unusual term in  
21 a courtroom, and if we're going to tell them they  
22 can do that, we should tell them what it is.

23           THE COURT: And then the second one that  
24 you were concerned about?



1 MS. PUSICH: Your Honor, the second one is  
2 the one talks about "with a thick, steadfast purpose  
3 to perform" -- I don't know if it's the word  
4 "perform" -- but "equal and exact justice under the  
5 law." And that has just become more problematic to  
6 the defense because equal and exact justice under  
7 the law would be to give him the same sentence the  
8 others got. Your Honor, that actually begins, "Now  
9 you will listen to the arguments of counsel," and  
10 it's toward the bottom.

11 THE COURT: Okay. Where does the language  
12 "equal and exact justice" come from?

13 MS. PUSICH: Your Honor, initially it came  
14 from a speech by Thomas Jefferson -- I know this  
15 because I've briefed this before -- but it's been  
16 here since.

17 THE COURT: Right. It isn't in the  
18 statute.

19 MS. PUSICH: No. It comes from case law,  
20 your Honor, not from the statute.

21 MR. YOUNG: I know it's been used  
22 previously. In my -- to, I guess, go in reverse  
23 order now to what's been discussed by counsel, this  
24 one, the equal and exact justice ends with "between

1 the defendant and the State of Nevada." I think  
2 what this instruction -- I will submit this  
3 instruction is getting at is that the jury is  
4 supposed to be fair to the State of Nevada and this  
5 specific defendant, Mr. Harte. It doesn't say  
6 anything about equal justice between Mr. Harte and  
7 his co-defendants. That's a whole other separate  
8 issue.

9 THE COURT: Right. But I think you need  
10 some cite for this. You've cited as your authority  
11 for this instruction 175.161.

12 MR. YOUNG: Yeah. I don't have that --  
13 don't have the case law in front of me. I can  
14 certainly work on getting that, if your honor is  
15 willing to entertain it.

16 THE COURT: Yes, I will. I'd like to see  
17 it.

18 MR. YOUNG: Sure.

19 THE COURT: I prefer to have -- even if I'm  
20 going to give it, I'd like to have the case law,  
21 even if it's archaic. And it is somewhat archaic  
22 because I've used this instruction probably many,  
23 many, many times over the last thirty years,  
24 depending on which place I was sitting or standing.

1 But I think it's a good idea, since it's  
2 been raised by the defense, for us to revisit it and  
3 look at the case law and see if we still want to use  
4 that language.

5 MR. YOUNG: Sure.

6 THE COURT: Okay. And if we are not  
7 convinced we want to use that language, the  
8 instruction would still be appropriate if they were  
9 instructed with the sole fixed and steadfast purpose  
10 of doing justice between the defendant and the State  
11 of Nevada. I mean, you could take out that equal --

12 MS. PUSICH: We would have no objection to  
13 that, your Honor.

14 THE COURT: Well, no, I didn't think you  
15 would, but I would like to see the language in the  
16 case law.

17 MR. YOUNG: I'll look for that, your Honor.

18 THE COURT: Okay.

19 MR. YOUNG: And I'll provide that as soon  
20 as I can. Because of timing, if I email, again,  
21 citations to both the Court and counsel tomorrow,  
22 would that be acceptable?

23 THE COURT: That would be fine, yes. Okay.  
24 So that's that one.

1           And then let's talk about Ms. Pusich's  
2     idea -- and I know that your request, counsel, is to  
3     not give any of the mitigating instructions that  
4     have been proposed by the defendant, and there were  
5     three.

6           MR. YOUNG:   Right.

7           THE COURT:   And the concept that if those  
8     weren't given, Ms. Pusich just sort of provided us  
9     an argument at the end, which is not in written the  
10    pleadings, I know, that some sort of instruction  
11    should be given to them about considering mitigating  
12    evidence.

13          MR. YOUNG:   Sure.   And if you look at that,  
14    it's in the packet that I proposed, that second  
15    instruction that Ms. Pusich brings up starting with  
16    "Although you are to consider" --

17          THE COURT:   Yes.

18          MR. YOUNG:   -- the one that we're  
19    discussing.   The second paragraph is the part that  
20    Ms. Pusich is discussing "The penalty verdict may  
21    never be influenced by sympathy," et cetera.   The  
22    very next paragraph is just a two-liner.   "However,  
23    you may consider all mitigating evidence presented."  
24    So that very same instruction does, in fact, tell

1 the jury what Ms. Pusich is requesting, that the  
2 jury can consider mitigating circumstances.

3 My issue with the three instructions that I  
4 brought up in the pleading is that all of them go to  
5 and discuss principles as related to capital cases  
6 where the death penalty is sought. So the first --  
7 it's not the first in order but the first one that I  
8 objected to starting with "mitigating circumstance  
9 itself" talks about juror -- are you there, your  
10 Honor?

11 THE COURT: Yes, I am.

12 MR. YOUNG: Okay.

13 -- talks about juror unanimity, whether  
14 aggravating circumstances have been proved and  
15 outweighing mitigating. Again, that's not  
16 appropriate in a non-capital case. The second one  
17 being -- that starts "Mitigating circumstances are  
18 things which do not" --

19 THE COURT: Right. I have that.

20 MR. YOUNG: -- again, it goes through a  
21 laundry list that, again, possibly in a capital  
22 case, which this initially was, might be  
23 appropriate. But, again, there's no necessity and  
24 there's no need to explain in detail what all these

1 things might be.

2 I don't even know if all of these are  
3 applicable to the defendant. I certainly know the  
4 one at line 13, which is E, "Defendant's family  
5 would suffer as a result of the imposition of a  
6 death sentence" obviously doesn't apply in this case  
7 because it's no longer capital.

8 And then it goes on, you know, that you can  
9 consider everything, which is, again, previously  
10 provided in the first instruction, so, again, I just  
11 don't know what authority there is to provide a  
12 laundry list.

13 And, again, I put in my brief I'm certainly  
14 not saying that the defense can't argue all of these  
15 things, but because it's no longer a capital case,  
16 there's no requirement to specifically list all  
17 those things.

18 And then the final instruction, which  
19 begins "In determining whether mitigating  
20 circumstances exist," again it gets into "Arguments  
21 of counsel do not relieve jurors of the  
22 responsibility of making independent objective  
23 analysis." That's already been told to the jury.  
24 Again, because we're not in a capital case,

1 mitigating circumstances and aggravating  
2 circumstances, while we use that term to understand  
3 from a legal perspective things that might enhance a  
4 sentence to death or, conversely, mitigating  
5 circumstances which would shy away from death as far  
6 as penalty, because death penalty is no longer  
7 available, it's inapplicable and it just would cause  
8 confusion.

9           So that's my point. Again, certainly the  
10 defense is free to argue all of the factors,  
11 circumstances, facts that would support something  
12 less than life without. But to get into any  
13 discussion about aggravating circumstances and  
14 mitigating circumstances when there's no need for  
15 the State to prove any aggravating circumstances,  
16 again, because it's no longer a capital case,  
17 there's no need for the State to show unanimity or  
18 prove unanimously aggravators and have them outweigh  
19 any specific instruction on mitigating  
20 circumstances, beyond simply saying you're free to  
21 consider that. It causes confusion and is  
22 unnecessary, is really the best way I could put it.

23           So I'm not objecting -- if counsel wants  
24 something kind of describing what mitigating

1 circumstances is; in other words, in a very -- I'm  
2 just spit-firing here -- in a very broad sense or  
3 general sense of mitigating circumstances or any  
4 facts that you believe, you know, justifies or  
5 causes some reason to impose something less than  
6 life without, I have no objection to a similarly  
7 worded instruction.

8 But to talk about all the things that  
9 counsel does about unanimity and weighing and then  
10 giving a two-page laundry list of things, some of  
11 which certainly don't apply, that's what the State  
12 is objecting to.

13 THE COURT: Okay.

14 MS. PUSICH: Your Honor, first, we're happy  
15 to accept their offer to provide a description of  
16 what mitigation is. I do think the jury needs that  
17 and I think, if they don't get that, the State  
18 doesn't get an anti-sympathy instruction. But I  
19 disagree with the State that simply saying you can  
20 make the argument is good enough.

21 One of the instructions that's been  
22 proposed -- and I expect the Court will give because  
23 it's routinely given -- is that arguments of counsel  
24 are not evidence. And instructions of the Court are



1 not evidence either, but they're even more important  
2 than that. They tell this jury this is what you  
3 must do. So simply saying that we have the  
4 opportunity to make an argument but no one is going  
5 to be given information about what it means, I don't  
6 think goes far enough.

7           The State's position throughout seems to be  
8 this is no longer capital, so the law really doesn't  
9 protect you, Mr. Harte, and I don't think that  
10 that's the reason we're going through all of this.  
11 I think the law does provide him with certain  
12 protections and I think that's the reason the  
13 resources are being devoted to having the second  
14 sentencing hearing and we need to be sure that we  
15 comply with both his procedural and substantive due  
16 process rights.

17           So I think the State does have some burden  
18 of proof. I think the jury should be instructed in  
19 the law and I don't think simply saying, well, you  
20 can make an argument and that covers everything  
21 actually is true.

22           THE COURT: How many first-degree murder  
23 sentencings have you done that were not done in the  
24 last five years?

1 MS. PUSICH: Oh, in the last five years, I  
2 don't know, your Honor. The total is I've handled  
3 nine that were capital and 51 that were not.

4 THE COURT: But in the last five years how  
5 many first-degree murder cases have gone to  
6 sentencing in this district, which is the one you're  
7 appearing in, to a jury verdict?

8 MS. PUSICH: I think, your Honor, in the  
9 last five years there have been five. Dodd, Biela,  
10 that was capital. I'm sorry. I should know this.  
11 But I think it's four or five, your Honor, in that  
12 time frame.

13 THE COURT: Okay. And the reason I'm  
14 asking is I have not been asked in a penalty hearing  
15 in first-degree murder to order that the jury  
16 consider a burden at penalty.

17 So what I'm asking you is, Have you offered  
18 these instructions to any other district judge as  
19 though we should erase from our memories Mr. Harte's  
20 conviction and sentence of death? We are now at the  
21 stage of a case which we find ourselves frequently  
22 waiving the jury. But if the jury is not waived,  
23 the jury makes the decision about penalty, and how  
24 many of those cases have you tried in the last five

1 years to a jury and what departments and have the  
2 judges given any of these instructions?

3 MS. PUSICH: Your Honor, the Dodd case was  
4 sentenced by the court. That was in '15. The name  
5 I can't remember was also sentenced by the court in  
6 '15. Kumaladine was sentenced by the court in '07.  
7 Biela was by the jury because it was capital in  
8 front of Judge Perry, Department 9. I don't think  
9 I've had one sentenced by jury since Snapp in  
10 Department 6 and that is more than five years ago.

11 THE COURT: And did you give any of these  
12 instructions?

13 MS. PUSICH: I would have to go back and  
14 look. It was actually that file I was using as my  
15 template to present instructions to you but those  
16 are the ones that I had proposed. I wasn't going  
17 off the ones given in Snapp.

18 THE COURT: And that's Snapp?

19 MS. PUSICH: Yes. State versus Snapp,  
20 Marquez, and there was a third co-defendant.

21 THE COURT: I'll pull those and see. Just  
22 curious, because I've never been offered them. Most  
23 of the time the jury is waived.

24 MS. PUSICH: Correct.

1           THE COURT: Most of the time defendants  
2 would prefer to have the --

3           MS. PUSICH: And, your Honor, the ones  
4 before that are long ago. The last time I can  
5 remember before that was Cheryl Walker, who was  
6 sentenced by jury here.

7           THE COURT: Yes, but the rules were  
8 different then.

9           MS. PUSICH: Yes.

10          THE COURT: Okay. So how would you define  
11 mitigation?

12          MS. PUSICH: Off the top of my head, your  
13 Honor, I believe the instruction that's been  
14 approved by the Supreme Court is any fact based in  
15 justice or mercy about which a jury can impose a  
16 sentence of less than the maximum.

17          THE COURT: Okay. Is that what you were  
18 thinking, Mr. Young?

19          MR. YOUNG: Yes. I'd want to see the -- to  
20 get the wording as precise as we can. Something  
21 along that line I would be okay with.

22          THE COURT: Okay. In light of my decision  
23 on the sentences of Mr. Cyrus and Ms. Babbs being  
24 told to the jury, I'd like you to look at the

1 instruction that was proposed by the State and tell  
2 me if there's any objections or additions that you  
3 would like for that instruction.

4 And it starts with, "In reaching your  
5 verdict, you may consider sentences imposed upon the  
6 defendant's co-defendants, Westin Cyrus and Leticia  
7 Babbs. However, you are not bound by those  
8 sentences and should impose whatever sentence for  
9 the defendant that you feel is appropriate."

10 MS. PUSICH: One moment, your Honor.

11 THE COURT: Yes.

12 MS. PUSICH: Thank you, your Honor. We're  
13 not waiving any of our earlier argued objections,  
14 but in light of the Court's ruling, I believe the  
15 instruction is appropriate.

16 THE COURT: Okay. So with regard to the  
17 language that is objected to in the instruction that  
18 begins "Although you are to consider only the  
19 evidence," I don't find that objectionable with the  
20 caveat that we tell the jury that they may consider  
21 any mitigating evidence.

22 But I also want a definition of mitigation,  
23 as requested by the defendant, so, Ms. Pusich, I'd  
24 like you to get that to Mr. Young and the Court and

1 we will give that in conjunction with the  
2 instruction.

3 MS. PUSICH: Yes, your Honor.

4 THE COURT: The other instruction that  
5 Mr. Young is going to get me is the authority for  
6 the language in the traditional ending instruction,  
7 which is "Now you will listen to arguments of  
8 counsel" that you include some language "equal and  
9 exact justice." So I want to read that before I  
10 approve that language. It is possible there could  
11 be a slight modification to the language in that  
12 instruction.

13 Now, with regard to the requested  
14 instructions by the defense on the other mitigating,  
15 the instruction reads, "In determining whether  
16 mitigating circumstances exist, jurors have an  
17 obligation to make an independent objective  
18 analysis. Arguments of counsel or a party do not  
19 relieve jurors of this responsibility. Jurors must  
20 consider the totality of the circumstances of the  
21 crime and the defendant as established and  
22 presented," and that "defendant's insistence on  
23 existence or non-existence of mitigating  
24 circumstances" is fine -- or "non-existence of

1 mitigating circumstances." Neither of those things  
2 are binding on the jurors. I think this instruction  
3 is not necessary given the case that we're doing and  
4 so I'm going to grant the State's objection and  
5 refuse it. It will be marked as the Defendant's  
6 Instruction Refused A.

7           And then the instruction that reads  
8 "Mitigating circumstances," the laundry list, we  
9 will not use. I'm going to grant the State's  
10 objection. I don't believe because it to be  
11 appropriate in this case, but we will add the  
12 instruction that I'm asking for --

13           MS. PUSICH: Thank you, your Honor.

14           THE COURT: -- on the definition of  
15 mitigation. And so this instruction will be marked  
16 Defendant's Rejected Instruction B.

17           And then "Mitigating circumstances itself  
18 need not be agreed to unanimously; that is, any one  
19 juror can find mitigating circumstances without the  
20 agreement of the other jurors. The entire jury must  
21 agree unanimously, however, as to whether the  
22 aggravating circumstances have been proven and  
23 whether those circumstances outweigh the mitigating  
24 circumstances," that instruction I find is not

1 appropriate in this case when the death penalty is  
2 not available. So I will not be giving that  
3 instruction and you will mark that as Defendant's  
4 Offered Instruction Rejected C.

5 So I just got the penalty instructions in  
6 the Snapp case, which is CR05-2864, which has --  
7 counsel, you may approach. There were ten  
8 instructions given in the penalty phase. No  
9 mitigating instructions, no burden.

10 As we're looking at this, I assume that  
11 Snapp was affirmed.

12 MS. PUSICH: Your Honor, he was given life  
13 with.

14 THE COURT: But it was affirmed.

15 MS. PUSICH: I think the only one that had  
16 any issue on appeal was Camacho. Thank you, your  
17 Honor.

18 The only thing I would note for the record  
19 is that, as is usually the case, the jury that was  
20 imposing the sentence in Snapp had just received all  
21 the trial phase instructions.

22 THE COURT: Right, that is true. And I  
23 don't know if -- I think there's some trial phase  
24 instructions that have been reworded for this phase



1 of the trial.

2 And it looks to me like there may have been  
3 a special instruction offered in that case. It's a  
4 different type. I'm thinking it might have come  
5 from you, Ms. Pusich, "If you impose the sentence of  
6 life without the possibility of parole, that is a  
7 sentence the defendant will serve." This case was  
8 tried in '06, apparently, and so that is now the law  
9 and so I think the State has incorporated that  
10 language. Is that correct?

11 MS. PUSICH: Your Honor, in Snapp we were  
12 including that because the Supreme Court had  
13 recently decided Gallego.

14 MR. YOUNG: Your Honor, I proposed -- I  
15 think what you're getting to -- an instruction and  
16 it was similar to one proposed by the defense as  
17 well that begins "A prison term of fifty years." It  
18 has the Sonner v. State citation at the bottom.

19 THE COURT: I'll get there. Okay.

20 MR. YOUNG: Again, that lists out twenty  
21 years for either the fifty definite term or life.  
22 It means just as a possibility. The last paragraph  
23 reads "Life imprisonment without the possibility of  
24 parole means exactly what it says. A defendant

1 shall not be eligible for parole." That's out of  
2 the Sonner case, I think.

3 THE COURT: I think that does address it.  
4 And that's right, Ms. Pusich?

5 MS. PUSICH: It is, your Honor.

6 THE COURT: Okay. Are there any other  
7 objections to the instructions that the State has  
8 offered?

9 The defense has offered instructions that  
10 are very similar or identical, so to try to keep the  
11 font the same, we're going to go with the State's  
12 instructions. You certainly can raise more  
13 objections at the end of the trial if there's  
14 something that's come out prior to instructing the  
15 jury that you think creates an issue, but as of  
16 today, issues?

17 MS. PUSICH: Your Honor, I think certainly  
18 looking to what Judge Adams did in that case -- it  
19 was a little older than I remembered, but as time  
20 goes on, I'm finding that happens all the time.

21 In any event, that was before a tremendous  
22 change in the way the Supreme Court addressed  
23 sentencing. That was before Apprendi, that was  
24 before Blakely, that was before Bocrum. And I think

1 that the State does and needs to have a burden of  
2 proof even in a sentencing context. The State has  
3 repeatedly argued orally and in writing during this  
4 case that this is not a capital case. But that's  
5 part of the reason when I filed my reply points and  
6 authorities yesterday that I specifically looked for  
7 a case that wasn't capital.

8           And in 2011 in an immigration case the  
9 comment that was made by the prevailing part of the  
10 court was that, if we're granting relief by flipping  
11 a coin, they would reverse that in an instant, and I  
12 think we're back to that again. We're bringing a  
13 jury in and we're telling them that they have this  
14 very significant job, and certainly it is. A life  
15 has been lost. A life really is in the balance. I  
16 know it's not a capital case, but we're talking  
17 about if the jury agrees with us 23 years until he  
18 can make application for parole. This is not are  
19 you going to get a fine and do community service.  
20 It's a big deal, to use the common vernacular.

21           And I think if the Supreme Court is saying  
22 flipping a coin isn't sufficient, if the jury is not  
23 given any instruction about how they're supposed  
24 to decide, why can't they go back and flip a coin?

1 We haven't told them they can't, so I think there's  
2 a problem.

3 THE COURT: Well, we do tell them they have  
4 to give due consideration to all the evidence and  
5 they have to reach a verdict that's just to both  
6 parties. That's not flipping a coin.

7 MS. PUSICH: What if they don't agree? It  
8 could be. I don't think that we have given them  
9 enough. I understand the State's -- it's not  
10 capital. I agree it's not capital. But I also  
11 disagree with their suggestion that the only place  
12 that we consider all these factors is capital  
13 sentencing. We consider these factors, many of  
14 them, in deciding whether or not a person can be  
15 released on their own recognizance. These are the  
16 bail conditions from 178 or the considerations from  
17 178.

18 So it's not that they suddenly miraculously  
19 appear in the criminal justice system at the end of  
20 a capital case. Where can you live? Where can you  
21 work? What kind of a life will you live? Who will  
22 you be with? Do you support your children? All of  
23 those things are considered in the criminal justice  
24 system from the day someone is arrested, so it's not

1 that they only apply at the very end of a capital  
2 case. They apply throughout and they're important.

3 THE COURT: Point me to the instruction  
4 that you gave me that you're talking about.

5 MS. PUSICH: Your Honor, it's not an  
6 instruction. Part of what the State has been  
7 arguing is there's not a burden of proof for the  
8 State, and I disagree.

9 THE COURT: If there is, we have to  
10 instruct them and I can't figure out -- I mean, Ms.  
11 Pusich, your arguments are very eloquent and make a  
12 lot of sense when you're talking.

13 MS. PUSICH: But you want backup.

14 THE COURT: But I do. And I don't  
15 necessarily think that the instructions that we're  
16 giving allow the jury to make a decision of flipping  
17 a coin. But if there is something specific that  
18 you're offering, I'll certainly consider it.

19 When we talk about burden of proof, there  
20 is no burden of proof that they have to find the  
21 aggravators outlying the mitigators.

22 MS. PUSICH: Correct.

23 THE COURT: They don't have to do that.  
24 That's not required in this sentencing. And that's

1 why I asked you if you'd done a judicial jury  
2 sentencing recently.

3 Now, I do know of one that was done about  
4 two years ago in front of Judge Flanagan. I don't  
5 think you were in that case. I think Ms. Lunt had  
6 that case. It was the murder on California Avenue--

7 MS. PUSICH: Jacob Sanchez. It was Ms.  
8 Lunt.

9 THE COURT: -- during a purse-snatch.

10 MS. PUSICH: Right. There were two  
11 Sanchezes, but I believe hers was Jacob.

12 THE COURT: And that was a first-degree  
13 murder that went to a jury for determination.

14 MS. PUSICH: I do believe so.

15 THE COURT: And so I'll look and see if  
16 Judge Flanagan came up with any possible  
17 instructions and then I'll let you look --

18 MS. PUSICH: Thank you.

19 THE COURT: -- and come up with the idea if  
20 you think. And, Mr. Young, it might be a good idea  
21 for you to just kinda look through your packet of  
22 instructions and be ready to note those things that  
23 you do think require the jury to weigh and  
24 deliberate -- at least to deliberate.

1           MR. YOUNG: I can let you know that now, if  
2 you'd like.

3           THE COURT: I am ready.

4           MR. YOUNG: About halfway through there's  
5 an instruction that begins "The defendant in this  
6 case has previously been found."

7           THE COURT: Yes.

8           MR. YOUNG: So that's the instruction and  
9 that's kinda the instruction that there wasn't  
10 necessarily a citation to the top part because of  
11 the circumstances of this case are a re-sentencing.  
12 But that's what provides the jury that he has been  
13 found guilty beyond a reasonable doubt of  
14 first-degree murder, so that establishes the burden  
15 of proof has been satisfied.

16           Then it goes on to say "Under the law of  
17 this state, you must determine the sentence to be  
18 imposed and it's punishable by" and it gives three  
19 very specific sentences that can be imposed. So  
20 that is -- and then if you go two instructions  
21 later, I proposed an instruction which talks -- and,  
22 again, this is one that the defense proposes as  
23 well, a similar one -- about a deadly weapon will  
24 essentially be a like consecutive sentence, so that

1 if you were to -- not you, but the jury were to  
2 impose a sentence of 20 to life or 20 to 50, it  
3 would effectively mean parole eligibility at 40  
4 years.

5           So that's what informs the jury on the  
6 significance, if you will, of the sentence that  
7 they're imposing. So it's not flipping a coin. Per  
8 statute they only have three options, life with,  
9 life without or 50 with parole eligibility.

10 Essentially there's just simply no burden of proof  
11 on the State and that's why -- and I won't belabor  
12 the point -- but in my brief I ask what burden of  
13 proof would I have to prove?

14           In other words, the burden of proof falls  
15 on the State at trial of are the elements of the  
16 offense proved beyond a reasonable doubt? So that  
17 was done in this case. So now it's simply, all  
18 right, folks of the jury, of these three  
19 alternatives, which is the most appropriate  
20 sentence, and that's what this instruction provides.

21           THE COURT: I think her argument is not  
22 flipping a coin and pulling something out of a hat.  
23 She's talking about -- or at least the way I'm  
24 understanding her argument -- is shouldn't we tell



1 the jury that their decision should not be arbitrary  
2 or capricious, that it should be based upon evidence  
3 and their sound determination?

4 Is that sounding like an instruction,  
5 maybe?

6 MS. PUSICH: It is, your Honor, and you are  
7 correct.

8 MR. YOUNG: Well, the two instructions that  
9 I just talked -- the one in the middle of those two,  
10 which is a two-liner, reads, "You are to consider  
11 all of the evidence in determining a sentence and  
12 you must do so unanimously."

13 THE COURT: What about the instruction we  
14 frequently give that says that? I think it's been  
15 described as a modified Allen instruction. It's not  
16 an Allen instruction when it's given in an initial  
17 packet. It would be an Allen instruction if it was  
18 done as a dynamite instruction on a hung verdict.

19 What about the language in that?

20 MS. PUSICH: Your Honor, I don't believe  
21 that's in the packet, although it's easy to get.  
22 And also what I was asking the State about is if  
23 we've given them any information about selecting a  
24 foreman because they have not gotten that in this

1 case.

2 THE COURT: Right.

3 MR. YOUNG: Well, there is, your Honor --  
4 and, again, I apologize for being clunky in  
5 answering your question -- but if you look maybe  
6 five or six instructions in, it starts "The evidence  
7 presented both during the trial" -- and I may need  
8 to change that a little bit -- but "The evidence  
9 presented effectively during this penalty hearing  
10 may be considered by the jury in deciding the proper  
11 and appropriate sentence in this case."

12 Again, I might be missing the Court's  
13 focus.

14 THE COURT: No. That's --

15 MR. YOUNG: There's, again, without beating  
16 this down, there's no burden on the State. So it's  
17 hard for me to respond with an instruction that  
18 effectively says there's no burden beyond kind of  
19 what this says, what do you feel to be proper and  
20 appropriate.

21 This actually may be the instruction that  
22 best addresses Ms. Pusich's concern. Again, because  
23 they didn't hear the evidence in the trial, I may  
24 need to make some minor modifications to that, but

1 the point is clear.

2 THE COURT: Okay. Just so you know, the  
3 clerk has pulled up the Sanchez case instructions  
4 for me and a couple of things. Judge Flanagan in  
5 that case did use the language of "fixed and  
6 steadfast purpose of doing equal and exact justice  
7 between the defendant and the State."

8 But he also used an instruction, "In  
9 determining whether mitigating circumstances exist,  
10 jurors have an obligation to make an independent and  
11 objective analysis of all the relevant evidence.  
12 Arguments of counsel or a party do not relieve  
13 jurors of this responsibility. Jurors must consider  
14 the totality of the circumstances of the crime and  
15 the defendant as established by the evidence  
16 presented in the guilt and penalty phases of the  
17 trial. Neither the prosecution's nor the  
18 defendant's insistence on the existence or  
19 non-existence of mitigating circumstances is binding  
20 upon the jurors."

21 MR. YOUNG: That's the third instruction --  
22 I guess first in reverse order that you addressed  
23 that you struck.

24 THE COURT: Right. So I'm just telling you

1 that Judge Flanagan in a similarly situated case  
2 gave it as recently as a few years ago. Let's see  
3 what the date on this is. July 12<sup>th</sup>, 2012.

4 MR. YOUNG: And, your Honor, in rereading  
5 -- if it's the Court's intention to give an  
6 instruction on mitigating circumstances, what that  
7 means, similar to the brief recitation that Ms.  
8 Pusich provided, this third instruction doesn't  
9 offend the State nearly as much as the other two.  
10 It's the other two that we're getting to unanimity.  
11 That's a major concern.

12 In rereading this one I, frankly, would --  
13 if the Court is inclined to give a mitigation  
14 instruction, I would withdraw my objection to this  
15 one. I understand I'm doing an about-face.

16 THE COURT: No. It's okay.

17 MR. YOUNG: The one that begins "In  
18 determining whether mitigating circumstances exist."  
19 I will withdraw my objection to that one. Frankly,  
20 if we are going to define what "mitigating  
21 circumstances" means, it would make sense for me to  
22 put that in the first paragraph directly above this.

23 I still don't believe it's necessary, but  
24 it, frankly, doesn't offend me too much if the Court

1 would give that.

2 MS. PUSICH: Your Honor, I'll go ahead and  
3 prepare the introductory definition line and then  
4 add it to the beginning of that.

5 THE COURT: Okay. And so that was our  
6 Rejected A. So it's no longer Rejected A. We'll  
7 change the numbers on the other two and you'll  
8 resubmit that.

9 MS. PUSICH: Yes, your Honor.

10 THE COURT: But in terms of what was given,  
11 there was no burden and -- no other burden  
12 instruction provided. You're welcome to look over  
13 this packet and see if there's anything in there  
14 that you think should be added.

15 MS. PUSICH: Did that include what you  
16 characterized -- I realize it's not -- as the  
17 modified Allen?

18 THE COURT: No. But I don't know if in the  
19 penalty phase he had that instruction -- I mean in  
20 the guilt phase. I don't know if that instruction  
21 was given in the guilt phase, which it frequently is  
22 given in the guilt phase and so the jury usually has  
23 those instructions with them in the penalty phase.

24 So I don't think I would mind that

1 instruction. I'd let Mr. Young weigh in, obviously,  
2 but I think the jury does need to talk and  
3 deliberate with a view of reaching a unanimous  
4 verdict.

5 MS. PUSICH: Your Honor, I'll prepare that.  
6 And then also because we haven't had this jury that  
7 we're going to have previously, the one for  
8 selecting a foreman, I don't think that's in penalty  
9 instructions because they've just heard it.

10 THE COURT: Right. So they will need that  
11 also. I'll try not to forget these, because when we  
12 get busy with the trials sometimes we forget.

13 I also had my clerk look over your proposed  
14 instructions and there seemed to be a few little  
15 typos that she found, so we'll provide those to you  
16 once I -- I will read them over too. And then if I  
17 agree, you can read them too and we will make those  
18 changes. Otherwise, is there anything else we need  
19 to do before we start with our jury?

20 MS. PUSICH: We're set to mark exhibits on  
21 Friday morning. Mr. Harte would like to not be  
22 present. I don't think he needs to be but he wants  
23 us to make a record of that. But he's aware he  
24 could be but he does not want to be brought here for

1 that.

2 THE COURT: Okay.

3 MS. PUSICH: You reserved about an hour for  
4 us. You thought we would come in at about 11:00 on  
5 Monday in case there was anything last-minute. He's  
6 not really excited about being here for that either,  
7 so if he could just be brought for jury selection in  
8 the afternoon.

9 THE COURT: That's fine. Mr. Harte, do you  
10 understand you have a right to be present?

11 THE WITNESS: Yes.

12 THE COURT: And if you waive your right to  
13 be present, you can't complain that you couldn't  
14 talk to the lawyers or tell them an idea or tell  
15 them to say something different. If you're not  
16 here, you've waived your right to complain that you  
17 weren't available to talk to them.

18 THE DEFENDANT: I understand that.

19 THE COURT: And do you want to waive your  
20 right to be present for marking of exhibits and the  
21 preliminary discussions that we will have before  
22 selecting a jury?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: I'll allow your waiver to

1 exist.

2 MS. PUSICH: Thank you, your Honor.

3 THE COURT: So we will notify the sheriff  
4 that Mr. Harte needs to be here ready to go in  
5 civilian clothing probably about -- I don't know  
6 what time we'll call the jury.

7 THE CLERK: I believe it's 11:00.

8 THE COURT: So we'll have him here by noon  
9 and ready to go.

10 MR. YOUNG: Just two minor things I wanted  
11 to address.

12 THE COURT: Go ahead.

13 MR. YOUNG: The interview of Mr. Harte will  
14 be played and presented to the jury. In that I've  
15 made one minor redaction. I don't know if even  
16 "redaction" is the appropriate word.

17 But at one point early on the investigator  
18 asked in getting identifying information Mr. Harte's  
19 Social Security number. I had Mr. Evans, who is our  
20 IT guy, I believe he just basically muted that  
21 eight-second period of time where he provides his  
22 Social Security Number.

23 So for the exhibit that will admitted and  
24 played, there is that change, but that's all it is.



1 So I just wanted to make clear that that's the only  
2 redaction that's made and the reason why it's  
3 obviously being made.

4 THE COURT: And was that same interview  
5 played before the jury before?

6 MR. YOUNG: I don't believe so. It  
7 certainly wasn't done in the guilt phase because I  
8 suppose Bruton issues, but now that's no longer an  
9 issue. That's the interview that he ultimately  
10 confesses to the instant crime and then confesses to  
11 the Churchill County shooting.

12 THE COURT: Do you know if it was marked in  
13 the other case?

14 MR. YOUNG: I don't.

15 THE CLERK: I do have a videotape that was  
16 marked. There's an 11-A and 11-B and my  
17 descriptions are "Videotape interview with Harte."  
18 So I'm not sure what the difference between the two  
19 are right now until I see them.

20 MR. YOUNG: A and B should be VHS tapes.  
21 And then there was, you know, in '97 the VHS tapes  
22 were used. Because of the length of the interviews,  
23 they were broken into two VHS tapes. That has since  
24 been consolidated to one disk which has been

1 provided to the defense and, similarly, I'm  
2 providing them a copy of the redacted, even though  
3 it's the exact same thing, of what I intend to play.  
4 That should be A and B.

5 THE COURT: Okay. So I guess what we  
6 really should do is have an un-redacted one marked  
7 and the redacted one marked. The redacted one will  
8 be admitted and put before the jury. I would  
9 suggest that we do them 11-C and D.

10 MR. YOUNG: That's fine.

11 THE COURT: Just keep the same numbers  
12 going. We'll keep the VHS tapes that were here in  
13 case we need them for the other case. We won't  
14 substitute, because I don't have any place to take  
15 those other tapes if I don't leave them with the  
16 evidence.

17 MR. YOUNG: And to be clear, I'm just  
18 guessing that A and B are the two tapes. I don't  
19 know for sure.

20 THE COURT: Well, tomorrow or Friday when  
21 you all look at these exhibits, you can look at it.  
22 The clerk will have all the exhibits from the other  
23 trial in the courtroom and you guys can look at  
24 them. And if you come up with another idea, I'm

1 sure between all of you and the clerk it will be  
2 fine, so the suggestion is just a suggestion.

3 MR. YOUNG: The only other thing I wanted  
4 to put on the record, your Honor, is with respect to  
5 the reading of transcripts in this re-sentencing.  
6 The State anticipates reading two transcripts in,  
7 that being of Jerome Vaughn, who was the road boss  
8 with the cab company who has since deceased, and  
9 Kevin Lattick who did some analysis for the crime  
10 lab and is unavailable for this hearing.

11 As I understand it, the defense intends on  
12 putting in a transcript of Ms. Solomon, who, again,  
13 as I understand it, is also deceased, the  
14 defendant's mother. I won't go into all the details  
15 but we have discussed basically the semantics of  
16 that because there were three defense attorneys,  
17 different prosecutors and defense attorneys than us,  
18 that I believe we were going to make some minor  
19 changes as far as it would just be "prosecution" and  
20 "defense," and strike out some of the transition  
21 language between the attorneys just so it reads  
22 easier.

23 There's also some parts that, again, I  
24 think we'll agree upon to redact, being parts that

1 were objected to and sustained, any parts that  
2 reference the death penalty. And so counsel and I  
3 will work on that but typically how I've done it --  
4 it's been rare that I've had to do it but in the  
5 past when I've read in a transcript, I act as the  
6 prosecutor and counsel acts as the defense. If  
7 there's anything that the judge says, you would  
8 actually read that. And then whoever is putting  
9 that transcript in is responsible for bringing a  
10 reader. They would read it verbatim as the witness.

11 I just want to make sure that that's the  
12 Court's intention. Again, we will provide, I guess,  
13 redacted or modified transcripts to accommodate what  
14 we stipulate to should we change it or otherwise.  
15 Short of that, it will just be a straight reading,  
16 of -- we'll come to an agreement on it but I wanted  
17 to give the Court a head's up.

18 MS. PUSICH: And, your Honor, the State has  
19 provided you with page and line and numbers from the  
20 transcript of what is to be removed. It removes  
21 discussions on objections that ultimately are  
22 sustained. I agree with him that having the jury  
23 hear that the earlier counsel is now a judge is  
24 probably not the best thing for my client.

1 "Defense" and "Prosecution" is sufficient. None of  
2 us were here. I was here at the very beginning of  
3 Mr. Harte's case and never since.

4 THE COURT: Oh, yes, Judge Sattler. I keep  
5 forgetting. Did you really try this case?

6 MS. PUSICH: He really did. So I have no  
7 objection to those proposals.

8 THE COURT: Okay. So what I would want to  
9 do is I would like to have the redacted version  
10 marked and it won't go to the jury. It will be read  
11 but marked and part of the record that we hold. We  
12 have, of course, the transcripts. So when you get  
13 ready to prepare this document, if you will put a  
14 cover page on top of your redacted version that says  
15 "Redacted version of original testimony" and what it  
16 was and where that transcript is, so that if anybody  
17 ever wants to go back they can look at the original.  
18 We don't have to have an original marked at the same  
19 time as the redacted one.

20 MR. YOUNG: And you will like it marked  
21 this Friday with the balance of the exhibits?

22 THE COURT: Yes, if you can. And then  
23 it'll be marked by the clerk so that when you're  
24 ready to read, it will be here and you'll all have

1 your own copies. I have the transcripts in the  
2 printed form so we can pull those. I won't have a  
3 redacted version but I can follow along, probably,  
4 or you can give me another copy.

5 MR. YOUNG: Just so there's no confusion or  
6 somebody saying something that we agree shouldn't be  
7 said, I'll just provide redacted copies for myself,  
8 for counsel, for your Honor and the witness so  
9 everyone has the exact same parts crossed out or  
10 otherwise and then one of those would be marked as  
11 an exhibit.

12 THE COURT: Right. But have the witness  
13 read from the one that we actually are marking.

14 MR. YOUNG: Great. Thank you.

15 THE COURT: Okay. And so we will have --  
16 you'll bring the readers and then, Ms. Pusich,  
17 you'll bring a reader.

18 MS. PUSICH: Yes, your Honor.

19 THE COURT: Okay. Anything else?

20 MR. YOUNG: No, not from the State.

21 THE COURT: Do you all agree on your  
22 peremptory challenges?

23 MS. PUSICH: Your Honor, I think because  
24 the potential penalty is up to life, we should each

1 have eight.

2 THE COURT: Correct. I agree. And I'm  
3 thinking maybe two alternates would be plenty. I  
4 usually do one alternate a week. If you think it'll  
5 take two weeks, we'll do two.

6 MS. PUSICH: Your Honor, I think it  
7 probably is safer to have two. I agree that we may  
8 end up going a little faster than we had originally  
9 planned but it's still probably a good idea to have  
10 an extra person in flu season.

11 THE COURT: Any objection?

12 MR. YOUNG: I'll defer to your Honor.

13 THE COURT: Okay. So we'll do two  
14 alternates. And do you all agree on how many  
15 peremptory challenges you get for the alternates?

16 MS. PUSICH: I hadn't thought about it,  
17 your Honor. I think generally one each.

18 MR. YOUNG: That's fine with me.

19 THE COURT: I just want to make sure we  
20 have all of that done, because we'll start picking  
21 this jury on Monday afternoon. And if we get the  
22 jury, it may go a little quicker than you think. It  
23 may not but it could.

24 What we've been doing since the Supreme

1 Court said they didn't want you to exercise your  
2 peremptory challenges in front of the jury is we've  
3 been qualifying the panel for cause and then we take  
4 the for-cause panel to another courtroom with the  
5 law clerk and another bailiff and then you exercise  
6 your peremptory challenges in the courtroom on the  
7 record out loud. And then we bring the whole panel  
8 back, have them sit in the courtroom, and then call  
9 their names up in the order we will do them.

10 I will call one through six and then second  
11 alternate and then seven through 12 and the first  
12 alternate. So what will happen is your first  
13 alternate will be on the end in the front row and  
14 your second alternate on the end in the back row.  
15 Of course, they won't know they're alternates but  
16 that's the way we do it. That's the procedure that  
17 we'll use. Are you comfortable with that procedure  
18 or have any questions about it?

19 MR. YOUNG: I guess my only question is  
20 just to the last part of one through six. The  
21 seventh --

22 THE COURT: Name --

23 MR. YOUNG: -- person selected would be an  
24 alternate?



1 THE COURT: No. I'm sorry. It was  
2 confusing.

3 MS. PUSICH: The seventh person seated.

4 THE COURT: I'm just talking about the  
5 order they're seated in.

6 MR. YOUNG: So it's still the thirteenth  
7 and fourteenth jurors who are the alternates.

8 THE COURT: And we use the method where you  
9 qualify everybody, you exercise your peremptory  
10 challenges, and the first 12 people that were called  
11 into the jury box initially that are still sitting  
12 there are your jurors and your thirteenth and  
13 fourteenth are your alternates. So if you waive,  
14 we strike from the back and then middle.

15 Any questions? Counsel, are you waiving  
16 the reading of anything before we start? Have you  
17 gone over the complaint for information? Maybe on  
18 Friday go over the information with the clerk and  
19 make sure. I just want you to read the information  
20 and look at it and see if there's anything in that  
21 information that we shouldn't be reading, or are we  
22 reading it.

23 MS. PUSICH: Your Honor, when you say, Are  
24 you waiving the reading, I think with a jury who

1 wasn't here for the trial phase, that we probably  
2 should be reading it. But we'll look through it and  
3 make sure there's nothing in there that they  
4 shouldn't be read.

5 THE COURT: Yeah. My only concern is how  
6 that information might be read and in what context.  
7 Because normally we would say the defendant is  
8 charged. Here we're saying the defendant has been  
9 found guilty, and I already have an instruction that  
10 tells them at the beginning that he's been found  
11 guilty.

12 MR. YOUNG: Yeah, I would certainly propose  
13 that we read what he was initially charged with.  
14 And, frankly, I would not have a problem reading  
15 that as you normally would, and instead of adding  
16 the line of "he has pled not guilty," that would  
17 just be where you say he's already been found  
18 guilty, or words to that effect. Just so it's clear  
19 what the charges were and that he's been convicted  
20 and now we're here for sentencing. As far as  
21 whether we should advise them of the charges that  
22 he's been convicted of --

23 THE COURT: At that time.

24 MR. YOUNG: -- yes, I submit we definitely

1 should.

2 THE COURT: And then the clerk will put  
3 together what she normally does. She provides you  
4 with a copy of the information and then you can look  
5 at it, look at it independently and make sure that  
6 nothing she proposed to say is objectionable.

7 MS. PUSICH: Okay.

8 THE COURT: You both want to do opening  
9 statements, as I understand it. You want to do it  
10 at the beginning, right?

11 MR. YOUNG: Yes.

12 MS. PUSICH: Yes.

13 THE COURT: And then we'll proceed with  
14 evidence, reading the instructions, closing  
15 arguments and then a member of Mr. Castro's family  
16 wants to make a statement.

17 MS. PUSICH: Your Honor, what we had talked  
18 about was going through all the evidence but having  
19 the victim impact statement before the jury  
20 instructions and before the closing arguments.

21 THE COURT: Okay. Sorry. I have that  
22 written down. I just wanted to make sure. Okay.  
23 But the allocution will be before.

24 MS. PUSICH: If that's what happens, yes,

1 your Honor.

2 THE COURT: All right. If there's nothing  
3 else, then, for today, you have a little bit more to  
4 do and get to me for tomorrow and then we will see  
5 you on Monday at 11:00 -- well, she'll see you  
6 Friday.

7 MS. PUSICH: Thank you, your Honor.

8 MR. YOUNG: Thank you, your Honor.

9 THE COURT: Court's in recess.

10 (Whereupon, proceedings were concluded at  
11 4:45 p.m.)  
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1 STATE OF NEVADA )  
2 COUNTY OF WASHOE ) SS.

3 I, CHRISTINA MARIE AMUNDSON, official reporter  
4 of the Second Judicial District Court of the State  
5 of Nevada, in and for the County of Washoe, do  
6 hereby certify:

7 That as such reporter, I was present in  
8 Department No. 4 of the above court on Thursday,  
9 January 21, 2015, at the hour of 3:42 p.m. of said  
10 day, and I then and there took verbatim stenotype  
11 notes of the proceedings had and testimony given  
12 therein in the case of State of Nevada, Plaintiff,  
13 versus Shawn Harte, Et Al, Defendant, Case No.  
14 CR98-0074A.

15 That the foregoing transcript is a true and  
16 correct transcript of my said stenotype notes so  
17 taken as aforesaid, and is a true and correct  
18 statement of the proceedings had and testimony given  
19 in the above-entitled action to the best of my  
20 knowledge, skill and ability.

21 DATED: At Reno, Nevada, this 5th day of April 2015.  
22 /S/ Christina Marie Amundson, CCR #641

23 Christina Marie Amundson, CCR #641  
24

1 4185

2 JUDITH ANN SCHONLAU

3 CCR #18

4 75 COURT STREET

5 RENO, NEVADA

6  
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

10 -o0o-

11 THE STATE OF NEVADA, )

12 Plaintiff, )

13 vs. )

14 SHAWN R. HARTE, )

15 Defendant. )

CASE NO. CR98-0074A

DEPARTMENT NO. 4

16  
17 TRANSCRIPT OF PROCEEDINGS

18 TRIAL (PENALTY PHASE))

19 MONDAY, JANUARY 26, 2015, 1:00 P.M.

20 Reno, Nevada

21  
22 Reported By: JUDITH ANN SCHONLAU, CCR #18  
23 NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER  
24 Computer-aided Transcription

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A P P E A R A N C E S

FOR THE PLAINTIFF:            OFFICE OF THE DISTRICT ATTORNEY  
  
                                     BY:    ZACH YOUNG, ESQ.  
  
                                     MATTHEW LEE, ESQ.  
  
                                     DEPUTY DISTRICT ATTORNEYS  
  
                                     WASHOE COUNTY COURTHOUSE  
  
                                     RENO, NEVADA

FOR THE DEFENDANT:           OFFICE OF THE PUBLIC DEFENDER  
  
                                     BY:    MAIZIE PUSICH, ESQ.  
  
                                     CHERYL BOND ESQ.  
  
                                     DEPUTY PUBLIC DEFENDERS  
  
                                     350 S. CENTER STREET  
  
                                     RENO, NEVADA

1                   RENO, NEVADA; MONDAY, JANUARY 26, 2015; 1:00 P.M.

2                                   -oOo-

3  
4                   THE COURT: Thank you. Please be seated. Good  
5                   afternoon, ladies and gentlemen. You have been summoned to the  
6                   Second judicial District Court. If you do not already realize  
7                   it, you are in Department 4, and my name is Connie  
8                   Steinheimer. I am the juge that presides in this department.  
9                   In a few minutes, many of you are going to be called upon to  
10                  speak in front of all of us, and I would like you to know who  
11                  you are speaking in front of and who else is here with us. So  
12                  at this time, I'd ask that the parties introduce themselves.

13                  MR. YOUNG: Good afternoon, ladies and gentlemen.  
14                  My name is Zach Young, Deputy District Attorney with the  
15                  Washoe County D.A. office. My co-counsel is Matt Lee, also a  
16                  Deputy District Attorney. We are representing the State of  
17                  Nevada in this case.

18                  MR. BOND: Good afternoon ladies and gentlemen. My  
19                  name is Cheryl Bond along with counsel, Maizie Pusich. We are  
20                  representing Mr. Shawn Harte.

21                  THE COURT: Thank you. Also with us are the staff  
22                  that serve here with me in Department 4, and I would ask that  
23                  they introduce themselves to you.

24                  DEPUTY BUTLER: I am Deputy Butler with the Washoe



1 County Sheriff's Office assigned to Judge Steinheimer.

2 MS. MAZZA: I am Chelsea Mazza, the law clerk for  
3 Judge Steinheimer.

4 THE CLERK: Good afternoon. My name is Marci Stone.  
5 I am Judge Steinheimer's court clerk.

6 THE COURT: I am Judge Steinheimer.

7 THE COURT REPORTER: I am Judy Schonlau, the court  
8 reporter.

9 THE COURT: We all appreciate your attendance here  
10 today. I know that at best jury service is an inconvenience  
11 and for many of you it can create a hardship. With that being  
12 said, I assume that all of you are here because there is no  
13 legal exception for you serving as a juror. In other words,  
14 you cannot be excluded for jury service. So what we are going  
15 to to today is make the best possible use of your time as we  
16 can. I know that jury service can interrupt your life and can  
17 cause you some issues. In this matter, you have been summoned  
18 for a case that will take approximately a week and a half. It  
19 will definitely be finished by the beginning of next week,  
20 first few days of next week. This case is criminal in nature.  
21 In a few minutes, I will tell you more detail. I want to give  
22 you the information about why you are here before we start on  
23 voir dire. As we begin this process, I want each of you to  
24 understand what we all understand and that is that you are an

1 essential part of our criminal justice system. It s necessary  
2 to have people from the community who will come and serve on a  
3 jury. It makes our system of government separate and apart  
4 from all others all over the world. It is what keeps this  
5 country moving forward and what is giving our citizens the  
6 confidence to know that the judicial system works for them,  
7 works for each citizen and is given by the citizens of the  
8 community. With that being said, we have to make sure that we  
9 have people from all walks of life, all economic strata. So  
10 sometimes that makes it more difficult on some people,  
11 especially those of you who work by the hour or by commission,  
12 and you can't get paid unless you are at work. So I want you  
13 to understand how important your time is here and that we  
14 appreciate that. I will let you know if you are serving on  
15 this jury in advance what your hours are going to be. I will  
16 make the time that you are here at the courthouse productive,  
17 and I promise you that we will not waste your time. It is  
18 valuable. And I also want to tell you how much we appreciate  
19 your willingness to serve. Now I say that, I know you were all  
20 summoned and you were told you don't have a choice but you are  
21 willing and you are here and you are serving and, we know that  
22 you will be for the remainder of the day.

23 What is going to happen now, we are going to start  
24 the process known as jury selection. That is voir dire. It

1 means to speak the truth and it is the way the attorneys can  
2 determine those of you that are best suited, in their opinion,  
3 it is only their opinion, to serve as a juror in this case.  
4 We will begin the selection now and we will go through until  
5 approximately 3:00 o'clock or 3:30. We always take a break  
6 after two hours, but we will not take a break before two hours  
7 so make sure you stay focused and realize you must stay here  
8 with us while we are in this process.

9 I also asked that the bailiff give you pieces of  
10 paper and pencil, and this is so you can write down any answer  
11 that you would want to while you are here in the courtroom  
12 even if you are not in our jury box which is this whole area.  
13 So that being said, and with our thanks and appreciation and I  
14 hope your understanding of how significant each of you are to  
15 this process. This is the time previously set in CR98-0074,  
16 State of Nevada versus Shawn Harte.

17 Counsel for the State, are you ready to proceed?

18 MR. YOUNG: Yes, Your Honor.

19 THE COURT: Counsel for the defendant, are you ready  
20 to proceed?

21 MS. BOND: Yes we are, Your Honor.

22 THE COURT: We'll proceed at this time to call the  
23 roll. Those of you whose names are called by the clerk please  
24 answer here or present out loud.

1           (Whereupon the roll of the entire jury panel was called.)

2           THE COURT: Counsel for the State and Ms. Bond, will  
3 you approach, please?

4           You all hum. We are going to tell secrets.

5           THE COURT: Do you know anything about him being on  
6 probation?

7           MR. YOUNG: He's not on probation.

8           MS. BOND: I don't know.

9           THE COURT: Did you know anything about it?

10          MR. YOUNG: I have no idea unless he's a felon.  
11 What do you want to do?

12          THE COURT: I think he's trying to tell us he has  
13 criminal charges.

14          MS. BOND: Probably doesn't want us to ask him about  
15 it. What do you want to do?

16          MR. YOUNG: If you want to release him, I am okay  
17 with that.

18          MS. BOND: I am okay with it, too.

19          THE COURT: I will release him. We won't worry  
20 about it.

21          MR. YOUNG: Judge, is it your intention later to put  
22 it on the record?

23          THE COURT: We are on the record. That is why you  
24 are over here.

1           Okay. Michael LaForge, I think we are going to  
2       excuse you today so you can can down and tell the Jury  
3       Commissioner you are excused from service. Okay. Go  
4       downstairs. You don't have to serve. And the clerk will call  
5       another name to replace you.

6           (Whereupon jury selection was completed.)

7           THE COURT: Ladies and gentlemen of the jury, I would  
8       now like to explain briefly the roll each person in the  
9       courtroom is playing in these proceedings. You will, at the  
10      conclusion of the evidence, determine what you find the facts  
11      in the case to be and apply those facts to the law that I  
12      state to you, and, on that basis, reach a verdict consistent  
13      with the facts and the law.

14          It is the duty of the attorneys to present their  
15      respective cases in the most favorable light consistent with  
16      the truth and the law, but statements and argument of counsel  
17      made during the trial are not to be treated as evidence. Keep  
18      an open mind, refrain from forming or expressing any opinion  
19      concerning the case until all the evidence is in, the  
20      attorneys have made their closing arguments, you have received  
21      the Court's instructions as to the law and you retire to the  
22      jury room to find your verdict.

23          During the trial, do not discuss the case among  
24      yourselves or with any other person. To not allow anyone to

1 speak of it in your presence. You are not to read, listen to  
2 or observe any news media or other account regarding the  
3 trial. I want to remind you of how important this admonition  
4 is. Not only would you be violating the Court's rule, but  
5 also if you talk about the case and talk about what a witness  
6 says to someone outside of the courtroom, they may react to  
7 your description, and when they react to your description,  
8 that would be out loud or in writing and you could be  
9 influenced by their reaction. And in that way, someone who  
10 never saw the witness, never heard the testimony could  
11 influence the verdict of the jury and that would be improper.  
12 So it is very important that you follow this rule. Not only  
13 must you conduct yourself above reproach, but you must avoid  
14 even the appearance of improper conduct. For that reason, you  
15 may not speak to the defendant, attorneys or the witnesses  
16 during the trial, even upon matters which are completely  
17 unconnected with the case. You can't stand down there and  
18 complain about how slow the elevators are, the hot and cold in  
19 the courtroom which we will experience. I think the attorneys  
20 both told you they would ignore you, and it isn't because they  
21 are being rude, but they cannot speak to you and you cannot  
22 speak to them.

23 In the event that any person should attempt to  
24 discuss the case with you or in any manner attempt to

1 influence you with regard to it, you are to advise the bailiff  
2 who in turn will advise me immediately.

3 Any rulings made by the court during the course of  
4 the trial will be based upon the controlling law of the State  
5 of Nevada. Accordingly, you must not infer any meaning on my  
6 part based upon those rulings or infer any feeling on my part  
7 for or against either party in the case.

8 If any objection to the admission of evidence is  
9 sustained, you must not speculate as to what the answer might  
10 have been or draw any inference from the question, itself.

11 During the course of the trial, matters may arise  
12 which must be determined by me as a matter of law outside the  
13 presence of the jury. Again, you are not to speculate or be  
14 concerned in any way as to the reason for such occurrence. I  
15 assure you I will limit them in duration and frequency as much  
16 as the law permits.

17 Observe carefully each witness as they testify and  
18 consider carefully all of the evidence as it is presented, for  
19 it is you who must determine the credibility of witness and  
20 wherein the truth lies.

21 You may individually take notes during the trial and  
22 for that purpose you will have, you will be given pencils or  
23 pens and notepads from the bailiff. In the event, however, if  
24 there is a conflict between the notes of individual jurors

1 that were taken during the course of the trial and the memory  
2 of jurors or a juror, you must disregard the notes you took  
3 and proceed on the collective memorandum of the jury. The  
4 only authenticate record and complete record of this trial is  
5 being taken by the court reporter. You will not receive a  
6 transcript of any testimony. You will not see an instant  
7 replay. Be sure you pay close attention as it happens because  
8 it is for you to decide what to do in this case.

9 The clerk will now swear you, so stand, face her and  
10 raise your right hands.

11 (Whereupon the selected jury was sworn by the clerk.)

12 THE COURT: You may be seated. Ladies and gentlemen  
13 of the jury, you are admonished no juror may declare to their  
14 fellow jurors any fact relating to the case that you may know  
15 of your only knowledge, and if you do learn that you have some  
16 personal knowledge with regard to this case or the facts that  
17 are being contested, then you must notify the court outside  
18 the presence of your fellow jurors and must do so even if you  
19 have begun deliberating.

20 Please feel free to use our jury room during all the  
21 recesses in the trial. The bailiff will open the jury room  
22 door that goes to the outside a few minutes before you are  
23 expected in the morning and at lunch. At all times while you  
24 are here in the courtroom, the outside door will be kept



1 locked. You will come and go to the courtroom through your  
2 private door into the jury room. I ask that you not wander  
3 around the courthouse. That when you come into the court, you  
4 come directly to the jury room and go into the jury room and  
5 await us until trial starts. The bailiff will be giving you  
6 stickers to put on your outside clothing that say juror. Be  
7 sure to wear those at all times when you are going and coming  
8 so someone else will know you are a juror. We have a lot of  
9 trials going on this week in the courthouse. We want to make  
10 sure no one accidentally speaks of this case in front of you and  
11 also another case. They could be talking about a completely  
12 different case in front of you and you might think it is about  
13 this case, so we want to be clear they are aware that you are  
14 a juror and everyone knows not to talk in front of you.

15 The jury room has a microwave, a refrigerator and we  
16 have coffee, chocolate and tea, but not much else. You have  
17 to bring it from home. I don't let you walk around the  
18 courthouse on our breaks or at lunch time. You have to be  
19 sure to bring it with you into the courthouse. Feel free to  
20 leave it in the jury room while we are here in the courtroom,  
21 because it will be safe. That door will be locked. Before  
22 you leave tonight, deputy Butler will go over some things with  
23 you and answer your questions about logistics and parking if  
24 you have any questions in that regard. And so that will be

1       what is going to happen during the course of the trial.

2               Now I am going go to recess in just a few minutes,  
3       and I think we'll start tomorrow morning at 8:30. Does that  
4       work or do you want to start at 9:00?

5               MS. PUSICH: 8:30 will work.

6               MR. YOUNG: That's fine.

7               THE COURT: We'll start tomorrow morning at 8:30.  
8       The other days I think will be 9:00 o'clock, but tomorrow  
9       we'll start at 8:30 and we'll go about two hours and take a  
10      fifteen minute or so recess, then we will go about an hour and  
11      a half and you will get lunch. And lunch will be about an  
12      hour and a half. You will come back here, and you will have  
13      another two or three hours of testimony with a break in the  
14      middle. So that is what is going to happen tomorrow. That is  
15      your Tuesday. I anticipate Wednesday will be very much the  
16      same, but we may start at 9:00 o'clock instead of 8:30. We go  
17      close to 5:00. A few minutes before 5:00 we'll recess. But  
18      it will be very close to 5:00 o'clock. And the lunch hour  
19      will be around the noon hour. But tomorrow we are starting  
20      early and may take lunch a little bit later, 12:15 to get a  
21      little bit of a roll going before we take a break. We'll be  
22      taking those breaks, at least one break every couple of hours.  
23      So that is our Tuesday and Wednesday schedule. I'm not sure  
24      about Thursday and Friday yet, but will give you an update as

1 we go along and as the witnesses start. Tomorrow when you  
2 first come, you are going to hear opening statements of  
3 counsel, and then you will begin hearing testimony, so that is  
4 what will happen first thing tomorrow. So all of that being  
5 said, I am going to let you go into the jury room now in just  
6 a moment, but before you go, I am going to read the admonition  
7 to you. You will get it at all the breaks.

8 Remember until the trial is over, you may not  
9 discuss this case with anyone including your fellow jurors,  
10 members of your family, people involved in the trial or anyone  
11 else, and do not allow others to discuss the case with you.  
12 This includes discussing the case on the internet or in  
13 internet chat room or through internet blogs, internet  
14 bulletin boards such as Facebook, twitter, e-mail or text  
15 messaging. If anyone tries to communicate with you about this  
16 case, please let me know immediately.

17 Do not read, watch, or listen to or view any news  
18 reports or other accounts about the trial or anyone associated  
19 with the trial including any online information. Do not do  
20 any research such as consulting dictionaries, searching the  
21 internet or using other reference materials, and do not make  
22 any investigation into or about the case on your own.

23 If you need to speak to me about this case, write a  
24 note and give it to the bailiff. Thank you. We'll see you

1 tomorrow morning. You may step out of the courtroom now.

2 Counsel, I think we can take our recess and start  
3 tomorrow. If you have something you want to go over with me  
4 now, nothing?

5 MS. PUSICH: Your Honor, we need to finalize the  
6 Instructions we were talking about when we were in chambers.  
7 The State wants to put on the record we have had an  
8 opportunity to review redacted copies of the transcript of  
9 Kevin Lattyak and Linda Solomon.

10 THE COURT: I guess it would be best if you got here  
11 about 8:15 tomorrow morning. We can put that on the record  
12 right before. You are not quite ready, right? You don't have  
13 that Instruction yet?

14 MS. BOND: Haven't been able to work on it.

15 THE COURT: I figured that. Just so you know, the  
16 note that I showed you at sidebar has been filed in as part of  
17 the record. So we are sure that that photo that was handed to  
18 me which precipitated the discussion at sidebar with the juror  
19 is in the record. If there is nothing further for tonight, I  
20 will let you leave for the evening. Court's in recess.

21 (Whereupon, the proceedings were concluded.)

22 --o0o--  
23  
24

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

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

7 That as such reporter I was present in Department  
8 NO. 4 of the above-entitled court on Monday, January 26, 2015,  
9 at the hour of 1:00 p.m. of said day and that I then and there  
10 took verbatim stenotype notes of the proceedings had in the  
11 matter of THE STATE OF NEVADA vs. SHAWN R. HARTE, Case Number  
12 CR98-0074A.

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

20 DATED: At Reno, Nevada this 11th day of March, 2015.  
21  
22

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