

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 78978

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RESPONDENT'S ANSWERING BRIEF

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_____/

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

In 1999, Shawn Russell Harte (“Harte”) and his codefendants were convicted of murder with the use of a deadly weapon, and robbery with the use of a firearm. 1 Joint Appendix (“JA”) 1. Harte was sentenced to death. 1JA 9. On direct appeal, the Nevada Supreme Court upheld the conviction. *Harte v. State*, 116 Nev. 1054, 12 P.3d (2000).

Harte’s first habeas corpus petition was denied, and that was affirmed on appeal. In the interim, this Court decided *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) (holding that in a capital prosecution, the constitution prohibits basing an aggravating circumstance on the felony that was used to obtain the first degree murder conviction via a felony

murder theory), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005).

Based on that change in the law, Harte filed another habeas corpus petition. The district court agreed that the conviction was flawed and ordered a new sentencing hearing. This Court affirmed. *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008). After some extensive delays, that new penalty hearing was conducted. 3 JA, 4 JA, 5 JA. The jury returned a verdict of life without the possibility of parole for the murder. 6 JA 984. Harte was sentenced to a concurrent term of 72 to 180 months for the robbery, with a consecutive term for the use of a firearm. 6 JA 895.

On May 5, 2017, Harte filed a third petition for writ of habeas corpus (post-conviction), and a supplement to the petition with the assistance of appointed counsel. 6 JA 897, 907. The State moved to dismiss the petition, and Harte opposed. 6 JA 985, 990. A hearing was held on the motion to dismiss, and at the conclusion of the hearing, the district granted the State's motion as to grounds two through six of the petition, ordering additional briefing on ground one of the petition and the supplemental petition. However, Harte voluntarily withdrew ground one. 7 JA 1087.

Thereafter, the district court entered an order dismissing the remaining claims in the petition and supplemental petition. 7 JA 1094-1096. On appeal, Harte challenges the district court's dismissal of count

two of the petition and supplemental petition, and ground five of the supplemental petition. Harte also challenges the dismissal of grounds three and four of the petition and supplemental petition, and ground six of the supplemental petition.

II. STATEMENT OF FACTS

In 1999, appellant Harte and his two co-conspirators stood trial for their roles in the murder of cab driver John Castro. All were found guilty. Harte, the one who shot Castro in the head, was sentenced to death. Defendants Babb and Sirex were both sentenced to life without parole. Each of them appealed. Harte appealed but the judgment was affirmed. *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

III. SUMMARY OF ARGUMENT

The petition and supplemental petitions below raised various arguments that were materially indistinguishable from questions previously considered and rejected by the Nevada Supreme Court. The district court properly dismissed those claims as barred by the doctrine of the law of the case. Where the claims did arguably differ from the precise issues previously considered, they only did so because they were alleged in context of an ineffective assistance of counsel claim. However, the district court did not error in rejecting the ineffective assistance of counsel claims, because

even assuming the facts alleged by Harte were true, no deficient performance and actual prejudice could be established pursuant to *Strickland v. Washington, infra*.

IV. STATEMENT OF ISSUES

- A. Whether ground two of the petition and supplemental petition was properly dismissed.
- B. Whether ground three of the petition and supplemental petition was properly dismissed.
- C. Whether ground four of the petition and supplemental petition was properly dismissed.
- D. Whether ground five of the supplemental petition was properly dismissed.
- E. Whether ground six of the supplemental petition was properly dismissed.

V. STANDARD OF REVIEW

The district court dismissed the claims set forth in the petition and supplemental petition without an evidentiary hearing as barred by the doctrine of the law of the case. Generally, habeas claims must consist of more than bare allegations, and an evidentiary hearing on a habeas petition is mandated only if a petitioner asserts specific factual allegations not belied or repelled by the record. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008); *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222, 225 (1984).

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Many of the claims in the petition and supplemental petition alleged ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984) and its local progeny, dictate that our evaluation begins with the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” This Court gives deference to the district court’s findings regarding ineffective assistance where they are supported by substantial evidence and not clearly wrong. This Court reviews the district court’s application of law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164 (2005).

VI. ARGUMENT

A. Ground Two of the Petition and Supplemental Petition Were Properly Dismissed.

In Ground Two, Harte alleged that the district court erred by allowing the jury to hear the sentences of the co-defendants. That decision was reviewed and affirmed by *Harte v. State*, 132 Nev. 410, 373 P.3d 98 (2016):

The district court was within its discretion when it admitted evidence of the codefendants' sentences.

Harte argues that the district court erred by admitting evidence of his codefendants' sentences because it deprived him of his right to be sentenced individually. In this, he argues that the life-without-parole sentences his codefendants received were influenced by his invalid death sentence. Harte asks this court to issue an overarching rule that evidence of codefendants' sentences is never admissible in a penalty hearing. The State argues that the decision to admit or deny such evidence should

be left to the discretion of the district court on a case-by-case basis. We agree with the State.

Harte v. State, 132 Nev. 410 at 412 (emphasis in original).

On appeal, Harte attempts to avoid the law of the case doctrine by arguing that former appellate counsel was ineffective for advocating for a per se rule regarding the admission of his co-defendants' sentences, and should have instead argued for a fact-specific inquiry. Opening Brief ("OB"), 10. But the previous *Harte* decision did recognize that a fact-specific inquiry was appropriate: "we decline to issue such a rule because each case has unique facts and circumstances." *Harte* at 412. It did apply an abuse of discretion analysis, and it concluded that the district court did not abuse its discretion in admitting evidence of the codefendants' sentences.

The district court properly dismissed this claim as barred by the "law of the case" because the Nevada Supreme Court had reviewed the admission of the codefendant's sentences for an abuse of discretion and concluded no error. *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975).

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B. Ground Three of the Petition and Supplemental Petition
Were Properly Dismissed.

Ground Three alleged that the sentence was excessive and cruel and unusual punishment. In the Opening Brief, Harte alleges that appellate counsel was ineffective because “this issue should have been presented to this Court as an issue arising under the Eighth Amendment guarantee against cruel and unusual punishment, rather than argue the sentence was simply excessive.” OB, 13. Harte concedes, however, that in the prior opinion, this Court analyzed the punishment under the “cruel and unusual punishment standard.” *Id.* In 2016, this Court explained that “Harte’s sentence was not cruel or unusual.” *Harte*, 132 Nev. 410, 415 (2016). It construed the appellate argument as appearing “to be a cruel and unusual punishment challenge.” *Id.* It concluded that the punishment was not cruel and unusual, noting that “Harte killed a complete stranger without provocation.” *Id.* The district court appropriately dismissed this ground as barred by the law of the case. *Hall, supra*.

The constitutionality of Harte’s sentence is also barred by the law of the case as it was reviewed on the last appeal. *Harte v. State*, 132 Nev. Adv. Op. 40, 373 P.3d 98 (2016).

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C. Ground Four of the Petition and Supplemental Petition Was Properly Dismissed.

Ground Four concerns the order in which the parties argued, alleging ineffective assistance of counsel because the prosecutor argued first and last. This issue was considered previously considered and rejected by this court:

Harte also argues that the district court erred because the mandate in NRS 175.141(5) that the State argue both first and last does not apply in a penalty hearing. He also argues the mandate that the State argue last as found in *Schoels v. State*, 114 Nev. 981, 966 P.2d 735 (1998), does not apply here because *Schoels* was a death penalty case where the State carried a burden of proof. He claims that because the instant case is no longer a death penalty case, the burden no longer exists. We agree to the extent that neither authority required the district court to let the State argue twice in this case but conclude, nonetheless, that it is within the district court's discretion to so rule.

Harte, 132 Nev. 410 at 413.

This claim was properly dismissed as barred by the law of the case.

Hall, supra.

D. Ground Five of the Petition and Supplemental Petition Was Properly Dismissed.

Ground Five was essentially a combination of Grounds Two and Three, with a jury instruction added. It alleged that Harte's sentence was constitutionally invalid, violating United States Constitutional Amendments V, VI, VIII, and XIV. It further alleged that the sentence was

invalid because the jury was permitted to consider the sentences of the co-defendants. These issues were previously considered and rejected in *Harte*, 132 Nev. 410, 412 (2016). They are thus barred by the law of the case. *Hill, supra*.

Perhaps to avoid application of the law of the case doctrine, Harte adds an argument of ineffective assistance of counsel claim, taking issue with jury instruction 15. Harte concedes that his former counsel initially offered a version of this instruction that included “you are not bound by those sentences.” OB, 16. The word “bound,” was originally derived from *Flanagan v. State*, 107 Nev. 243, 810 P.2d 759 (1991), *certiorari granted, judgment vacated by Moore v. Nevada*, 503 U.S. 930, 112 S. Ct. 1463 (1991). The record reveals that Harte’s former counsel explained the reason for agreeing to the language that was ultimately included in instruction 15 was strategic. 5 JA 772. The instruction that was ultimately given was not materially different:

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

7 JA 888.

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Even if Harte could somehow demonstrate that his former counsel's agreement to instruction 15 was somehow objectively unreasonable, he has failed to articulate how the change in wording resulted in prejudice to him within the meaning of *Strickland, supra*. No specific facts supporting actual prejudice are alleged in the petition or the Opening Brief. The jury instruction that was used informed the jury that it may consider the sentences of the co-defendants, but it did not have to impose the same sentence. That is another way of saying the jury was not bound to render the same sentences. Though a distinction can be drawn between the instruction advocated by Harte in his post-conviction appeal, a material difference between the two instructions is lacking. No relief or evidentiary hearing was warranted as to this ground, because it either alleged error already rejected in the prior decision, or failed to allege facts that, if true, would have necessitated an evidentiary hearing. *Hargrove, supra; Nika, supra*.

E. Ground Six of the Petition and Supplemental Petition.

Ground Six alleged cumulative error. Because there was no error, as discussed above, there are no errors to cumulate. This ground was therefore properly dismissed.

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VII. CONCLUSION

Based on the foregoing, the State respectfully asserts that the decision of the district court should be affirmed.

VIII. ROUTING STATEMENT

Because this is a post-conviction appeal regarding a Category A felony, this matter is presumptively assigned to the Nevada Supreme Court. NRAP 17 (b)(1).

DATED: January 16, 2020.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

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

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

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

DATED: January 16, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 16, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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