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FILED

UNITED STATES COURT OF APPEALS

MAY 10 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

TANI KO C. SMITH,

Petitioner-Appellant,

v.

BRIAN E. WILLIAMS, Sr.; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 19-17514

D.C. No.

2:12-cv-00952-APG-VCF

District of Nevada,  
Las Vegas

ORDER

Before: FERNANDEZ, SILVERMAN, and N.R. SMITH, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

**FILED****NOT FOR PUBLICATION**

APR 1 2021

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MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Andrew P. Gordon, District Judge, PresidingSubmitted March 31, 2021\*\*  
San Francisco, California

Before: FERNANDEZ, SILVERMAN, and N.R. SMITH, Circuit Judges.

Nevada state prisoner Taniko C. Smith appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. We have

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § § 1291 and 2253. We review the district court's decision de novo, *see Smith v. Ryan*, 823 F.3d 1270, 1278 (9th Cir. 2016), and we affirm.

Smith contends that the aiding and abetting instruction given at his trial violated due process because it eliminated the specific intent element required to prove murder and attempted murder. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we give considerable deference to state court decisions. Habeas relief may only be granted if the adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.”<sup>1</sup> 28 U.S.C. § 2254(d); *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). Neither is present in this case. The challenged instruction amply informed the jury of the requisite mental state and did not have “the effect of relieving the State of the burden of proof” on this critical question. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *see also Waddington v. Sarausad*, 555 U.S. 179, 190-92 (2009).

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<sup>1</sup> Even if we were to agree with Smith that de novo review applied, his claim would still fail.

**AFFIRMED.**

**United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

**Information Regarding Judgment and Post-Judgment Proceedings****Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)****Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)****(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

#### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

#### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

#### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

#### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.



**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 10. Bill of Costs**

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1  
2  
3 **UNITED STATES DISTRICT COURT**4 **DISTRICT OF NEVADA**

5 TANIKO C. SMITH,

6 Petitioner

7 v.

8 BRIAN E. WILLIAMS, SR., et al.,

9 Respondents.

Case No.: 2:12-cv-00952-APG-VCF

**Order**

10 Taniko C. Smith, a Nevada prisoner, filed a petition for a writ of habeas corpus under 28  
11 U.S.C. § 2254. I deny Smith's habeas petition, grant him a certificate of appealability, and direct  
12 the Clerk of the Court to enter judgment accordingly.

13 **I. BACKGROUND**

14 In my previous order, dated September 30, 2015, I described the crime as revealed by the  
15 evidence at Smith's trial as follows:

16 Petitioner and three others robbed Christopher Brown and Mario Wesley in the  
17 parking lot of a restaurant. Brown grabbed his gun, shot at the robbers, in turn was  
18 shot through the legs, and fled. Wesley laid on the ground pleading for his life.  
19 Petitioner and the three others started walking away. One of the other robbers,  
20 Richard Gaston, turned around and shot Wesley. Petitioner stood by while this  
21 happened. Then all four together walked away from the restaurant. Wesley later  
22 died.

23 ECF No. 54 at 6 (citing ECF No. 39 at 59-60). Following a jury trial, Smith was found guilty of  
first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly  
weapon, two counts of robbery with the use of a deadly weapon, and attempted robbery with the  
use of a deadly weapon. ECF No. 40-10. The Nevada Supreme Court affirmed Smith's  
convictions on December 3, 1998. ECF No. 41-3.

1 Smith filed a federal habeas petition on December 2, 1999, case number CV-S-99-1691-  
2 PMP-LRL. ECF No. 41-5. This court dismissed the petition because Smith had not exhausted  
3 his available state-court remedies. ECF No. 41-10. Smith filed a state habeas petition on October  
4 30, 2000. ECF No. 41-13, 41-14, 41-17. The state district court denied Smith's petition, and the  
5 Nevada Supreme Court affirmed, determining that the petition was untimely under Nev. Rev.  
6 Stat. § 34.726(1). ECF No. 41-26, 41-27.

7 On January 30, 2002, Smith filed another state habeas petition. ECF No. 41-29, 42. The  
8 state district court denied the petition, and the Nevada Supreme Court affirmed, again  
9 determining that the petition was untimely. ECF No. 42-11, 42-18. The Nevada Supreme Court  
10 denied rehearing on May 13, 2003. ECF No. 42-20.

11 While Smith's second state habeas petition was pending, he filed another federal habeas  
12 petition in this court on March 26, 2002, case number CV-N-02-0121-HDM-VPC. ECF No. 42-  
13 4. This court appointed the Federal Public Defender to represent Smith. ECF No. 42-3. Smith  
14 filed a counseled, amended petition, and the respondents moved to dismiss. ECF No. 42-13, 42-  
15 15. This court determined that the petition was untimely under 28 U.S.C. § 2244(d) and denied a  
16 certificate of appealability. ECF No. 43, 43-4. The Ninth Circuit denied a certificate of  
17 appealability. ECF No. 43-6.

18 On April 8, 2005, Smith moved to correct an illegal sentence in the state district court.  
19 ECF No. 43-8. The state district court denied the motion. ECF No. 43-11. The Nevada Supreme  
20 Court affirmed, noting that Smith's arguments were outside the narrow scope allowed for such a  
21 motion, that the doctrine of the law of the case prevented further litigation of the issues raised by  
22 Smith, and that Smith's claims did not appear to implicate the jurisdiction of the state district  
23 court. ECF No. 43-13.

1 Smith filed another federal habeas petition on January 25, 2006, case number 3:06-cv-  
2 00003-RCJ-VPC. ECF No. 43-15. This court dismissed the action as successive under 28 U.S.C.  
3 § 2244(b). ECF No. 43-17. The Ninth Circuit denied Smith's application for authorization to file  
4 a successive federal habeas petition. ECF No. 43-20. On August 14, 2006, Smith filed another  
5 federal habeas petition, case number 06-cv-00976-RCJ-RJJ. ECF No. 43-21. The respondents  
6 moved to dismiss the petition. ECF No. 44-1. This court granted the motion. ECF No. 44-13.

7 On January 31, 2007, Smith filed another state habeas petition. ECF No. 44. The state  
8 district court granted Smith's petition, overturning his convictions for murder and attempted  
9 murder and vacating his sentence. ECF No. 44-6. The state district court entered an amended  
10 judgment of conviction on August 21, 2007. ECF No. 44-5. On January 20, 2009, the Nevada  
11 Supreme Court reversed and remanded, finding that the petition was untimely under Nev. Rev.  
12 Stat. § 34.726 and that Smith had not shown good cause to excuse the procedural defect. ECF  
13 No. 44-14. The Nevada Supreme Court denied rehearing and en banc reconsideration. ECF No.  
14 44-16, 44-19. The United States Supreme Court denied Smith's petition for a writ of certiorari.  
15 ECF No. 45-3.

16 On July 2, 2009, before the state district court did anything on the remand, Smith asked  
17 the Ninth Circuit for authorization to file a successive petition, case number 09-72049. ECF No.  
18 45. The Ninth Circuit denied the application on January 20, 2010. ECF No. 45-5. On March 14,  
19 2012, the state district court entered a second amended judgment of conviction, reinstating the  
20 convictions and sentences for first-degree murder and attempted murder. ECF No. 45-6. Smith  
21 appealed, and the Nevada Supreme Court affirmed on May 15, 2013. ECF No. 46-3.

1 Smith filed another federal habeas petition on April 5, 2012, case number 2:12-cv-00570-  
2 GMN-PAL. ECF No. 45-8. This court dismissed the petition without prejudice due to Smith's  
3 failure to submit an in forma pauperis application. ECF No. 45-9.

4 Smith's current federal habeas petition was filed on August 8, 2012. ECF No. 5. Smith  
5 moved to amend this petition on August 17, 2012. ECF No. 6. The respondents opposed the  
6 motion arguing, among other things, that this petition was successive. ECF No. 9-1. This court  
7 issued an order on August 23, 2012, for Smith to show cause why his present petition should not  
8 be dismissed as a successive petition due to his failure to first obtain an order from the Ninth  
9 Circuit authorizing this court to consider the petition. ECF No. 11. Smith responded to the order  
10 to show cause on September 4, 2012. ECF No. 13. On April 11, 2013, this court found that  
11 Smith had shown good cause not to dismiss his petition for being successive; however, this  
12 court's review of the state-court dockets revealed the possibility that this action was premature  
13 and unexhausted. ECF No. 14. Thus, this court issued another order to show cause why this  
14 court should not dismiss the action for lack of exhaustion. *Id.* Thereafter, this action was  
15 reassigned to me for all further proceedings. ECF No. 17.

16 Smith moved to stay the proceedings, for a status check, for clarification, for the  
17 appointment of counsel, and to lift the stay. ECF No. 15, 24, 25, 26, 27. The respondents moved  
18 for reconsideration of the April 11, 2013 order. ECF No. 19. On May 28, 2014, I denied the  
19 respondents' motion for reconsideration, granted Smith's previous motion to amend, appointed  
20 counsel for Smith, and denied Smith's motions for a stay, for a status check, for clarification, and  
21 to lift the stay. ECF No. 29. I also explained that the question of exhaustion was no longer an  
22 issue following the Nevada Supreme Court's order dated May 15, 2013. *Id.*

1 Smith filed a counseled, amended petition and an errata to the amended petition on  
2 November 17, 2014, and December 5, 2014, respectively. ECF No. 35, 47. The respondents  
3 moved to dismiss Smith's amended petition. ECF No. 49. On September 30, 2015, I granted the  
4 motion, dismissed the action with prejudice as untimely, and directed the clerk of the court to  
5 close this action. ECF No. 54. In my analysis of whether Smith established actual innocence to  
6 excuse a violation of the statute of limitations, I concluded that the aiding and abetting jury  
7 instruction used at Smith's trial complied with *Sharma v. State*, 118 Nev. 648, 56 P.3d 868  
8 (2002). *Id.* at 5. Judgment was entered in favor of the respondents. ECF No. 55.

9 Smith appealed. ECF No. 56. On September 8, 2017, the Ninth Circuit reversed the  
10 dismissal of the petition, holding that "whenever there is a new judgment by the state court, the  
11 procedural limitation on second or successive habeas petitions under AEDPA applies anew."  
12 ECF No. 62 at 7. The Ninth Circuit remanded the matter for further proceedings. *Id.* at 11. The  
13 Ninth Circuit also indicated that "[t]here is no procedural hurdle to Smith's making his *Sharma*  
14 claims on the merits," and if I "reject[ ] that claim on the merits, Smith will then have the  
15 opportunity to appeal that decision." *Id.* at 11.

16 Smith moved for dismissal of Ground Two and Ground Three of his amended petition.  
17 ECF No. 66. I granted the motion. ECF No. 67. Accordingly, Smith's amended petition  
18 contains only a single remaining ground: the aiding and abetting jury instruction used at his trial  
19 violated *Sharma*. ECF No. 35. The respondents answered this remaining ground (ECF No. 76)  
20 and Smith filed a reply (ECF No. 79).

## 21 **II. STANDARD OF REVIEW**

22 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas  
23 corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

1 An application for a writ of habeas corpus on behalf of a person in custody pursuant  
2 to the judgment of a State court shall not be granted with respect to any claim that  
3 was adjudicated on the merits in State court proceedings unless the adjudication of  
4 the claim –

5 (1) resulted in a decision that was contrary to, or involved an unreasonable application  
6 of, clearly established Federal law, as determined by the Supreme Court of the  
7 United States; or

8 (2) resulted in a decision that was based on an unreasonable determination of the facts  
9 in light of the evidence presented in the State court proceeding.

10 A state court decision is contrary to clearly established Supreme Court precedent, within the  
11 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing  
12 law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that  
13 are materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*,  
14 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing  
15 *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application  
16 of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if  
17 the state court identifies the correct governing legal principle from [the Supreme] Court’s  
18 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75  
19 (quoting *Williams*, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state  
20 court decision to be more than incorrect or erroneous. The state court’s application of clearly  
21 established law must be objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10)  
22 (internal citation omitted).

23 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks  
merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the  
correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing  
*Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a

1 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.*  
2 at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)  
3 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating  
4 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”  
5 (internal quotation marks and citations omitted)).

### 6 **III. DISCUSSION**

7 Smith argues that his federal constitutional rights were violated when the jury convicted  
8 him under a faulty aiding and abetting liability theory that did not require the State to prove all  
9 the elements of the crime. ECF No. 35 at 10. Specifically, Smith contends the aiding and  
10 abetting jury instruction improperly failed to provide that the State must prove that he had the  
11 specific intent to commit murder and attempted murder; rather, the instruction only contained a  
12 general intent requirement. *Id.* at 12; ECF No. 79 at 20. Smith contends that this error cannot  
13 be considered harmless because the evidence did not demonstrate his guilt for murder and  
14 attempted murder under any of the three alternative theories of liability. ECF No. 35 at 14-16.  
15 Contrarily, the respondents argue that the aiding and abetting jury instruction required the jury  
16 to find specific intent and that any error was harmless because there was sufficient evidence of  
17 Smith’s specific intent to convict him of murder and attempted murder. ECF No. 76 at 5-6.

18 In the State’s appeal of the order granting Smith’s state habeas petition, the Nevada  
19 Supreme Court held:

20 In his petition, respondent asserted that his convictions for murder with the use of  
21 a deadly weapon and attempted murder with the use of a deadly weapon were based  
22 on aiding and abetting jury instructions that violated *Sharma v. State*. He claimed  
23 that this court’s decision in *Mitchell v. State*, which held that *Sharma* should be  
applied retroactively, constituted good cause for his failure to raise this claim in a  
timely petition.



1 We conclude that the district court erred in finding that respondent demonstrated  
2 good cause sufficient to excuse his procedural defects. In *Sharma*, we rejected the  
3 natural and probable consequences doctrine and held that “in order for a person to  
4 be held accountable for the specific intent crime of another under an aiding and  
5 abetting theory of principal liability, the aider and abettor must have knowingly  
6 aided the other person with the intent that the other person commit the charged  
7 crime.” In *Mitchell*, this court held that *Sharma* was a clarification of the law. As  
8 *Sharma* reflects a clarification of the law, the underlying reasoning in *Sharma*  
9 existed at the time of respondent’s trial and presented a basis for which appellant  
could have presented a claim on direct appeal. Additionally, respondent failed to  
establish prejudice. The jury was not instructed in accordance with the natural and  
probable consequences doctrine. Rather, the jury was properly instructed “[a]  
person aids and abets the commission of a crime if he knowingly and with criminal  
intent aids, promotes, encourages or instigates by act or advice, the commission of  
such crime.” Therefore, we conclude that the district court erred in finding that  
respondent established good cause and prejudice to excuse the filing of an untimely  
habeas petition.

10 ECF No. 44-14 at 3-6. The Nevada Supreme Court’s ruling regarding the merits of Smith’s  
11 claim was reasonable.

12 The Amended Indictment accused Smith of murder with the use of a deadly weapon  
13 “under the following theories of criminal liability, to-wit: (1) Premeditation; (2) Felony  
14 Murder . . . ; (3) Aiding or Abetting.” ECF No. 36-14 at 2-3. The Amended Indictment also  
15 accused Smith of attempted murder with the use of a deadly weapon and provided that Smith, his  
16 co-defendant Richard Gaston, Darnell Robinson, and Rodney Harris “aid[ed] or abet[ed] each  
17 other by counsel and encouragement and by entering into a course of conduct.” *Id.* at 3. The jury  
18 was instructed regarding aiding and abetting as follows:

19 Where two or more persons are accused of committing a crime together, their guilt  
20 may be established without proof that each personally did every act constituting the  
offense charged.

21 All persons concerned in the commission of a crime who either directly or actively  
22 commit the act constituting the offense or who knowingly and with criminal intent  
23 aid and abet in its commission or, whether present or not, who advise and encourage  
its commission, are regarded by the law as principals in the crime thus committed  
and are equally guilty thereof.

1 A person aids and abets the commission of a crime if he knowingly and with  
2 criminal intent aids, promotes, encourages or instigates by act or advice, or by act  
and advice, the commission of such crime.

3 The state is not required to prove precisely which defendant actually committed the  
4 crime and which defendant aided and abetted.

5 ECF No. 40-2 at 55 (Jury Instruction No. 44). Regarding intent generally, the jury was  
6 instructed: “[i]ntent refers only to the state of mind with which the act is done.” *Id.* at 22. The  
7 jury found Smith guilty of murder with the use of a deadly weapon and attempted murder with  
8 the use of a deadly weapon. ECF No. 40-3 at 2-3. The jury’s reliance on a particular theory of  
9 liability is unclear. *Cf. Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (“A conviction based on a  
10 general verdict is subject to challenge if the jury was instructed on alternative theories of guilt  
11 and may have relied on an invalid one.”). The jury later confirmed that its verdict for murder  
12 with the use of a deadly weapon was first-degree murder. ECF No. 40-4 at 10-11.

13 Issues relating to jury instructions are not cognizable in federal habeas corpus unless they  
14 violate due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *see also Gilmore v. Taylor*, 508  
15 U.S. 333, 342 (1993) (“[W]e have never said that the possibility of a jury misapplying state law  
16 gives rise to federal constitutional error.”). The question is “whether the ailing instruction by  
17 itself so infected the entire trial that the resulting conviction violates due process’, . . . not merely  
18 whether ‘the instruction is undesirable, erroneous, or even universally condemned.’” *Henderson*  
19 *v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)).  
20 Furthermore, jurors are presumed to follow the instructions that they are given. *United States v.*  
21 *Olano*, 507 U.S. 725, 740 (1993). Even if an instruction contains constitutional errors, the court  
22 must then “apply the harmless-error analysis mandated by *Brecht*[ *v. Abrahamson*, 507 U.S. 619

1 (1993)].” *Calderon v. Coleman*, 525 U.S. 141, 146 (1998). The question is whether the error had  
2 a “substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 145.

3 At the time of Smith’s trial in 1996, the law in Nevada on the mental state required to  
4 convict an aider or abettor was inconsistent. *See Sharma v. State*, 56 P.3d 868, 872 (Nev.  
5 2002). “In one line of cases, for example, [the Nevada Supreme Court] required the State to  
6 show that the defendant knowingly and intentionally aided another to commit the charged  
7 crime.” *Id.* (citing *Tanksley v. State*, 944 P.2d 240 (Nev. 1997), as an illustrative example of  
8 this line of cases). Following Smith’s trial, in 1998, the Nevada Supreme Court abandoned this  
9 line of cases and instead adopted the “natural and probable consequences doctrine,” which held  
10 “aiders and abettors . . . criminally responsible for all harms that [we]re a natural, probable, and  
11 foreseeable result of their actions.” *Mitchell v. State*, 971 P.2d 813, 820 (Nev. 1998), *overruled*  
12 *in relevant part by Sharma*, 56 P.3d at 872. Years later in 2002, the Nevada Supreme Court  
13 stepped back from *Mitchell* and narrowed the definition of aiding and abetting by holding that  
14 “in order for a person to be held accountable for the specific intent crime of another under an  
15 aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided  
16 the other person with the intent that the other person commit the charged crime.” *Sharma*, 56  
17 P.3d at 872; *see also Bolden v. State*, 124 P.3d 191, 200-01 (Nev. 2005) (holding that “a  
18 defendant may not be held criminally liable for the specific intent crime committed by a  
19 coconspirator simply because that crime was a natural and probable consequence of the object  
20 of the conspiracy”), *overruled on other grounds by Cortinas v. State*, 195 P.3d 315, 324 (Nev.  
21 2008). First degree murder and attempted murder are specific-intent crimes. *See Keys v. State*,  
22 766 P.2d 270, 273 (Nev. 1988); *Hancock v. State*, 397 P.2d 181, 182 (Nev. 1964).

1 The heart of Smith’s argument is that a petitioner’s due process rights are violated if a  
2 jury instruction “ha[s] the effect of relieving the State of the burden of proof enunciated in  
3 *Winship* on the critical question of petitioner’s state of mind.” *Sandstrom v. Montana*, 442 U.S.  
4 510, 521 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause  
5 protects the accused against conviction except upon proof beyond a reasonable doubt of every  
6 fact necessary to constitute the crime with which he is charged.”); *Evanchyk v. Stewart*, 340 F.3d  
7 933, 939 (9th Cir. 2003) (“It is a violation of due process for a jury instruction to omit an  
8 element of the crime.”). The issue at hand is whether Jury Instruction No. 44 ran afoul of  
9 *Sharma* by eliminating the requirement that the jury find that Smith had the requisite mental  
10 state, thus violating his due process rights. It did not.

11 The Nevada Supreme Court held that *Sharma* “applies to cases that were final [at the  
12 time] it was decided” because “*Sharma* was a clarification of the law, not a new rule.” *Mitchell v.*  
13 *State*, 149 P.3d 33, 38-39 (Nev. 2006).<sup>1</sup> Because *Sharma* merely clarified the law, its  
14 renouncement of the “natural and probable consequences doctrine” signaled a return to the line  
15 of cases, illustrated by *Tanksley*, that “required the State to show that the defendant knowingly  
16 and intentionally aided another to commit the charged crime.” *Sharma*, 56 P.3d at 871. Jury  
17 Instruction No. 44’s language mirrors this requirement: “A person aids and abets the commission  
18 of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by  
19

---

20 <sup>1</sup> Smith argues that “[t]he Nevada Supreme Court found a *Sharma* violation based on  
21 the [ ] instructions in *Mitchell*,” which were identical to the instructions used in his case. ECF No.  
22 79 at 19-20. However, the Nevada Supreme Court merely concluded that *Sharma* “applied to  
23 *Mitchell*,” and “under *Sharma*, *Mitchell* should not have been convicted of attempted murder as  
an aider or abettor unless he . . . had the specific intent that [the victim] be killed.” *Mitchell*, 149  
P.3d at 38. The Nevada Supreme Court then vacated the conviction in *Mitchell* because the State  
“acknowledged that *Mitchell* did not have the specific intent to kill.” *Id.* The Nevada Supreme  
Court did not analyze the instructions used in *Mitchell*.

1 act or advice, or by act and advice, the commission of such crime.” ECF No. 40-2 at 55.  
2 Accordingly, as I held previously, “the instruction actually given at trial satisfies the  
3 requirements of *Sharma*.” ECF No. 54 at 6. The Nevada Supreme Court, the final arbiter of the  
4 Nevada law reflected in the jury instruction, read the instruction in the same way. ECF No. 44-14  
5 at 5. Because Smith fails to establish that the jury instructions ““so infected the entire trial that  
6 the resulting conviction violates due process”” (*Henderson*, 431 U.S. at 154), the Nevada  
7 Supreme Court’s ruling was not contrary to, or an unreasonable application of, clearly  
8 established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). I deny Smith  
9 habeas corpus relief.<sup>2</sup>

10 The standard for the issuance of a certificate of appealability requires a “substantial  
11 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). “Where a district court has  
12 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is  
13 straightforward: The petitioner must demonstrate that reasonable jurists would find the district  
14 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.  
15 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000).

16 Reasonable jurists could debate my conclusion that Smith’s due process rights were not  
17 violated. The Nevada Supreme Court explained that *Sharma* was not a new rule. But its  
18 ultimate holding in *Sharma* was a retreat to an earlier line of cases and might be read to establish  
19 a narrower requirement than some of those earlier cases regarding the mental state required to  
20 convict an aider and abettor of a specific-intent crime. *Compare Sharma*, 56 P.3d at 871

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22 <sup>2</sup> Smith argues I should conduct an evidentiary hearing to properly review this claim.  
23 ECF No. 79 at 26. Because I decided this claim based on a legal issue such that a harmless-error  
analysis and a review of the facts is unnecessary, further factual development is also  
unnecessary. *See* 28 U.S.C. § 2254(e)(2).

(explaining that “[i]n one line of cases” before the adoption of the natural and probable consequences doctrine, the law “required the State to show that the defendant knowingly and intentionally aided another to commit the charged crime”), *with Sharma*, 56 P.3d at 871 (“hold[ing] that in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person *with the intent* that the other person commit the charged crime.” (Emphasis added)). Because Jury Instruction No. 44 did not contain the additional intent language, reasonable jurists could find debatable my conclusion that Smith’s due process rights were not violated. *See Nelson v. State*, 123 Nev. 534, 548-49, 170 P.3d 517, 527 (2007) (impliedly affirming the following jury instruction: “A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime *with the intention that the crime be committed*” (emphasis added)). Accordingly, I grant Smith a certificate of appealability.

**V. CONCLUSION**

I THEREFORE ORDER that the First Amended Petition for a Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 (ECF No. 35) is **DENIED**.

I FURTHER ORDER that Smith is granted a certificate of appealability.

I FURTHER ORDER the Clerk of the Court to enter judgment accordingly.

Dated: December 2, 2019.



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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE


## IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
TANI KO CURT SMITH,  
Respondent.

No. 50122

**FILED**

JAN 20 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is the State's appeal from an order of the district court granting respondent's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On May 2, 1997, the district court convicted respondent, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon (Count 1), one count of attempted murder with the use of a deadly weapon (Count 2), two counts of robbery with the use of a deadly weapon (Counts 3 and 4), and one count of attempted robbery with the use of a deadly weapon (Count 5). The district court sentenced respondent to serve two equal and consecutive terms of life in the Nevada State Prison without the possibility of parole for Count 1 with additional terms totaling sixty years for the remaining counts. This court dismissed respondent's direct appeal.<sup>1</sup> The remittitur issued on December 22, 1998.

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<sup>1</sup>Smith v. State, Docket No. 30243 (Order Dismissing Appeal, December 3, 1998).

On October 30, 2000, respondent filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On January 31, 2001, the district court denied respondent's petition as untimely. This court affirmed the district court's order on appeal.<sup>2</sup>

On January 30, 2002, respondent filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. On July 10, 2002, the district court denied respondent's petition as untimely after conducting an evidentiary hearing. This court affirmed the district court's order on appeal.<sup>3</sup>

On February 23, 2005, respondent filed a motion to correct an illegal sentence in the district court. The district court denied the motion on May 18, 2005. This court affirmed the district court's order on appeal.<sup>4</sup>

On January 31, 2007, respondent, through counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that it was untimely filed. In addition, the State specifically pleaded laches. The district court did not conduct an evidentiary hearing. However, on August 21, 2007, the district court granted respondent's petition and vacated respondent's convictions

---

<sup>2</sup>Smith v. State, Docket No. 37387 (Order of Affirmance, November 20, 2001).

<sup>3</sup>Smith v. State, Docket No. 39860 (Order of Affirmance, April 10, 2003).

<sup>4</sup>Smith v. State, Docket No. 45258 (Order of Affirmance, November 10, 2005).



for murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. This appeal followed.

The State argues that the district court erred in finding that respondent demonstrated good cause to excuse his delay in filing the petition.

Respondent filed his petition more than 7 years after this court issued the remittitur from his direct appeal. Thus, respondent's petition was untimely filed.<sup>5</sup> Respondent's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>6</sup>

In his petition, respondent asserted that his convictions for murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon were based on aiding and abetting jury instructions that violated Sharma v. State.<sup>7</sup> He claimed that this court's decision in Mitchell v. State,<sup>8</sup> which held that Sharma should be applied retroactively, constituted good cause for his failure to raise this claim in a timely petition.

We conclude that the district court erred in finding that respondent demonstrated good cause sufficient to excuse his procedural defects. In Sharma, we rejected the natural and probable consequences

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<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See id.

<sup>7</sup>118 Nev. 648, 56 P.3d 868 (2002).

<sup>8</sup>122 Nev. 1269, 149 P.3d 33 (2006).

doctrine and held that “in order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider and abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.”<sup>9</sup> In Mitchell, this court held that Sharma was a clarification of the law.<sup>10</sup> As Sharma reflects a clarification of the law, the underlying reasoning in Sharma existed at the time of respondent’s trial and presented a basis for which appellant could have presented a claim on direct appeal.<sup>11</sup> Additionally, respondent failed to establish prejudice. The jury was not instructed in accordance with the natural and probable consequences doctrine. Rather, the jury was properly instructed “[a] person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, the commission of such crime.” Therefore, we conclude that the district court erred in finding that respondent established good cause and

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<sup>9</sup>Sharma, 118 Nev. at 655, 149 P.3d at 872.

<sup>10</sup>Mitchell, 122 Nev. at 1276, 149 P.3d at 38.

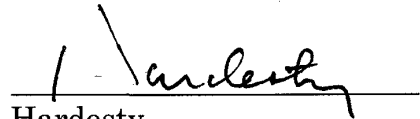
<sup>11</sup>See Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (stating that if a decision merely construes and clarifies an existing rule rather than announce a new rule, this court’s interpretation is merely a restatement of existing law).

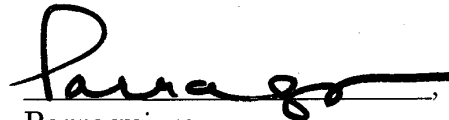


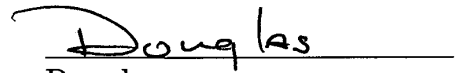
prejudice to excuse the filing of an untimely habeas petition.<sup>12</sup>

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.  
Hardesty

 J.  
Parraguirre

 J.  
Douglas

cc: Hon. Lee A. Gates, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Joel M. Mann, Chtd.  
Eighth District Court Clerk

---

<sup>12</sup>As we conclude that appellant's claims were procedurally barred, we need not discuss the arguments regarding the merits of those claims.

**ORIGINAL**1 **AJOC**

2 **STEVEN B. WOLFSON**  
 3 **Clark County District Attorney**  
 4 **Nevada Bar #001565**  
 5 **200 Lewis Avenue**  
 6 **Las Vegas, Nevada 89155-2212**  
 7 **(702) 671-2500**  
 8 **Attorney for Plaintiff**

**FILED IN OPEN COURT**  
**STEVEN D. GRIERSON**  
**CLERK OF THE COURT**

**MAR 4 2012**  
 BY *[Signature]*  
**KEITH REED, DEPUTY**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

8 **THE STATE OF NEVADA,**  
 9 **Plaintiff,**

10 **-vs-**

11 **TANI KO CURT SMITH,**  
 12 **#1044632**

13 **Defendant.**

**CASE NO: 93C115252-1**

**DEPT NO: VI**

14 **SECOND AMENDED JUDGMENT OF CONVICTION**  
 15 **(JURY TRIAL)**

16 The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 -  
 17 MURDER WITH USE OF A DEADLY WEAPON (Felony / Category A); COUNT II -  
 18 ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony / Category B);  
 19 COUNT III, IV, VII - ROBBERY WITH USE OF A DEADLY WEAPON (Felony /  
 20 Category B); COUNT V - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON  
 21 (Felony / Category B); and COUNT VIII - GRAND LARCENY AUTO (Felony / Category  
 22 C), committed on or between July 27, 1993, and August 4, 1993, in violation of NRS  
 23 200.010, 200.030, 193.165, 193.330, 200.380, 205.220, and the matter having been tried  
 24 before a jury, and the Defendant being represented by counsel and having been found guilty  
 25 of the crimes of COUNT I - MURDER IN THE FIRST DEGREE WITH THE USE OF A  
 26 DEADLY WEAPON (Felony / Category A); COUNT II - ATTEMPT MURDER WITH  
 27 USE OF A DEADLY WEAPON (Felony / Category A); COUNTS III & IV - ROBBERY  
 28 WITH USE OF A DEADLY WEAPON (Felony / Category B); ad COUNT V - ATTEMPT  
 ROBBERY WITH USE OF A DEADLY WEAPON (Felony / Category B); and

93C115252-1

AJOC

Amended Judgment of Conviction  
 1802028

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3

1 WHEREAS, thereafter, on the 26<sup>th</sup> day of March, 1997, the Defendant being present  
2 in Court with his counsel RICHARD PALMA, Deputy State Public Defender, and  
3 CARMINE COLUCCI, ESQ., and LYNN ROBINSON, Deputy District Attorney also being  
4 present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial  
5 and verdict and, in addition to the \$25.00 Administrative Assessment Fee, sentenced  
6 Defendant to the Nevada Department of Prisons for LIFE WITHOUT THE POSSIBILITY  
7 OF PAROLE plus an EQUAL AND CONSECUTIVE LIFE WITHOUT THE  
8 POSSIBILITY OF PAROLE for use of a deadly weapon and PAY \$112,646.27  
9 RESTITUTION for Count I and SENTENCED to Nevada Department of Prisons for  
10 FIFTEEN (15) YEARS plus an EQUAL AND CONSECUTIVE FIFTEEN (15) YEARS for  
11 use of a deadly weapon for Count II, to be served CONSECUTIVELY to Count I and  
12 SENTENCED to Nevada Department of Prisons for FIFTEEN (15) YEARS plus an EQUAL  
13 AND CONSECUTIVE FIFTEEN (15) YEARS for the use of a deadly weapon for Count III,  
14 to be served CONSECUTIVELY to Count II and SENTENCED to Nevada Department of  
15 Prisons for FIFTEEN (15) YEARS plus an EQUAL AND CONSECUTIVE (15) YEARS for  
16 use of a deadly weapon for Count IV, to be served CONCURRENTLY with Count III and  
17 SENTENCED to Nevada Department of Prisons for SEVEN AND ONE HALF (7 1/2 )  
18 YEARS plus an EQUAL AND CONSECUTIVE SEVEN AND ONE HALF (7 1/2) YEARS  
19 for the use of a deadly weapon for Count V, to be served CONCURRENTLY with Counts  
20 III and IV. Said sentence to be served CONCURRENTLY with case C98647 with NO  
21 Credit for Time Served. COURT ORDERED, COUNTS VI, VII, AND VIII ARE  
22 DISMISSED.

23 WHEREAS, thereafter, on the 30<sup>th</sup> day of January, 2007, the Defendant filed a  
24 petition for writ of habeas corpus (post-conviction). This cause having come on for hearing  
25 before the Honorable Lee Gates, District Judge, on the 20<sup>th</sup> day of June, 2007, the Defendant  
26 being present with his counsel JOEL M. MANN, the Respondent being represented by  
27 DAVID ROGER, District Attorney, by and through JAMES SWEETIN, Chief Deputy  
28 District Attorney, and the Court having considered this matter, including briefs, transcripts,

1 arguments of counsels, and documents on file herein, now therefore, the Court did find that  
2 the Defendant's convictions and sentences for COUNT I – MURDER IN THE FIRST  
3 DEGREE WITH THE USE OF A DEADLY WEAPON (Felony); COUNT II – ATTEMPT  
4 MURDER WITH USE OF A DEADLY WEAPON (Felony); be OVERTURNED AND  
5 VACATED pursuant to the Court's Findings of Fact and Conclusions of Law.

6 WHEREAS, the State of Nevada appealed the decision by Judge Lee Gates, which  
7 granted the Defendant's Petition for Writ of Habeas Corpus overturning and vacating Count  
8 I – Murder With Use of a Deadly Weapon and Count II – Attempt Murder With Use of a  
9 Deadly Weapon.

10 THEREAFTER, on January 20, 2009, the Nevada Supreme Court issued and  
11 ORDERED the judgment of the District Court REVERSED AND REMANDED this matter  
12 to the District Court for proceedings consistent with this order.

13 THEREAFTER, Count 1 - MURDER WITH USE OF A DEADLY WEAPON - with  
14 a sentence of LIFE WITHOUT THE POSSIBILITY OF PAROLE plus an EQUAL AND  
15 CONSECUTIVE LIFE WITHOUT THE POSSIBILITY OF PAROLE and Count 2 -  
16 ATTEMPT MURDER WITH USE OF A DEADLY WEAPON with a sentence of FIFTEEN  
17 (15) YEARS plus an EQUAL AND CONSECUTIVE FIFTEEN (15) YEARS are hereby  
18 REINSTATED.

19 THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this  
20 Judgment of Conviction as part of the record in the above entitled matter.

21 DATED this 14 day of March, 2012.

22  
23  
24   
25  
26 DISTRICT JUDGE  
27

28 98F05895A:abf

144  
1 INST

FILED IN OPEN COURT  
 DEC 02 1996 19 5:18 pm  
 LORETTA BOWMAN, CLERK  
 BY Tina Hurd  
 Deputy

DISTRICT COURT  
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA, )

9 Plaintiff, )

10 -vs- )

11 TANI KO CURT SMITH, #1044632, )  
 12 RODNEY MANUEL HARRIS, #0855307 )

13 Defendant(s). )

Case No.  
 Dept. No.  
 Docket

C115252/C125993  
 VII  
 P

## 15 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

## 16 MEMBERS OF THE JURY:

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

20 You must not be concerned with the wisdom of any rule of law stated in these instructions.  
 21 Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your  
 22 oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

23  
 24  
 25  
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 EOR1215

INSTRUCTION NO. 2

1  
2 If, in these instructions, any rule, direction or idea is repeated or stated in different ways,  
3 no emphasis thereon is intended by me and none may be inferred by you. For that reason, you  
4 are not to single out any certain sentence or any individual point or instruction and ignore the  
5 others, but you are to consider all the instructions as a whole and regard each in the light of all  
6 the others.

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

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INSTRUCTION NO. 3

1  
2 An Amended Indictment as to TANI KO CURT SMITH is but a formal method of accusing a  
3 person of a crime and is not of itself any evidence of his guilt.

4 In this case, it is charged in an Indictment/Information that on or between July 16, 1993, and  
5 August 4, 1993, the Defendant committed the offenses of **MURDER WITH USE OF A DEADLY**  
6 **WEAPON (Felony - NRS 200.010, 200.030, 193.165); ATTEMPT MURDER WITH USE OF A**  
7 **DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.330, 193.165); ROBBERY WITH USE**  
8 **OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); ATTEMPT ROBBERY WITH USE**  
9 **OF A DEADLY WEAPON (Felony - NRS 200.380, 193.330, 193.165); and ATTEMPT GRAND**  
10 **LARCENY AUTO (Felony - NRS 205.220, 193.330),**

11 COUNT I - MURDER WITH USE OF A DEADLY WEAPON

12 TANI KO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston, did, on or  
13 between July 27, 1993, and August 4, 1993, then and there, without authority of law and with malice  
14 aforethought, wilfully and feloniously kill MARIO WESLEY, a human being, by shooting at or into the  
15 neck and/or head of the said MARIO WESLEY with a deadly weapon, to-wit: a firearm, resulting in the  
16 death of the said MARIO WESLEY on August 4, 1993, said Defendants and an unidentified male being  
17 responsible under the following theories of criminal liability, to-wit: (1) Premeditation; (2) Felony  
18 Murder: Defendants and an unidentified male committed the murder in the perpetration or attempted  
19 perpetration of robbery; (3) Aiding or Abetting: The said Defendants and an unidentified male aiding or  
20 abetting each other by counsel and encouragement and by entering into a course of conduct whereby  
21 TANI KO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO  
22 WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and  
23 Defendant RICHARD CHARLES GASTON, aka Ricco Gaston acting as lookout, and Defendants and  
24 an unidentified male approached MARIO WESLEY and J. CHRISTOPHER BROWN, and one or more  
25 of the suspects displayed said firearm, and one or more of the suspects ordered MARIO WESLEY and  
26 J. CHRISTOPHER BROWN to lay down, while demanding their wallets and keys, after which one or  
27 more of the suspects shot the said MARIO WESLEY.

28 ///

EOR1217

1 COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

2 TANIKO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston, did, on or  
3 between July 27, 1993, and August 4, 1993, then and there, without authority of law and with malice  
4 aforethought, wilfully and feloniously attempt to kill J. CHRISTOPHER BROWN, a human being, by  
5 shooting at or into the legs of the said J. CHRISTOPHER BROWN with a deadly weapon, to-wit: a  
6 firearm, the said Defendants, DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS,  
7 aiding or abetting each other by counsel and encouragement and by entering into a course of conduct  
8 whereby TANIKO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO  
9 WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and  
10 Defendant RICHARD CHARLES GASTON, aka Ricco Gaston acting as lookout, and Defendants  
11 DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS, approached MARIO  
12 WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and  
13 one or more of the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down,  
14 while demanding their wallets and keys, after which one or more of the suspects shot the said J.  
15 CHRISTOPHER BROWN.

16 COUNT III - ROBBERY WITH USE OF A DEADLY WEAPON

17 TANIKO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston, did, on or  
18 about July 27, 1993, then and there wilfully, unlawfully, and feloniously take personal property, to-wit:  
19 wallet and/or lawful money of the United States and/or jewelry, from the person of MARIO WESLEY,  
20 or in his presence, by means of force or violence, or fear of injury to, and without the consent and against  
21 the will of the said MARIO WESLEY, said Defendants using a deadly weapon, to-wit: a firearm, during  
22 the commission of said crime, in the following manner, to-wit: the said Defendants DARNELL  
23 DEANDRE ROBINSON and RODNEY MANUEL HARRIS, aiding or abetting each other by counsel  
24 and encouragement and by entering into a course of conduct whereby TANIKO CURT SMITH locked  
25 the door to May-B's Restaurant and followed the said MARIO WESLEY and J. CHRISTOPHER  
26 BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and Defendant RICHARD CHARLES  
27 GASTON, aka Ricco Gaston acting as lookout, and Defendants, DARNELL DEANDRE ROBINSON  
28 and RODNEY MANUEL HARRIS, approached MARIO WESLEY and J. CHRISTOPHER BROWN,

1 and one or more of the suspects displayed said firearm, and one or more of the suspects ordered MARIO  
2 WESLEY and J. CHRISTOPHER BROWN to lay down, while demanding their wallets and keys, after  
3 which one or more of the suspects took said property from MARIO WESLEY.

4 COUNT IV - ROBBERY WITH USE OF A DEADLY WEAPON

5 TANIKO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston, did, on or  
6 about July 27, 1993, then and there wilfully, unlawfully, and feloniously take personal property, to-wit:  
7 wallet and/or lawful money of the United States and/or jewelry, from the person of J. CHRISTOPHER  
8 BROWN or in his presence, by means of force or violence, or fear of injury to, and without the consent  
9 and against the will of the said J. CHRISTOPHER BROWN, said Defendants using a deadly weapon,  
10 to-wit: a firearm, during the commission of said crime, in the following manner, to-wit: the said  
11 Defendants, DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS, aiding or  
12 abetting each other by counsel and encouragement and by entering into a course of conduct whereby  
13 TANIKO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO  
14 WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and  
15 Defendant RICHARD CHARLES GASTON, aka Ricco Gaston acting as lookout, and Defendants,  
16 DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS, approached MARIO  
17 WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and  
18 one or more of the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down,  
19 while demanding their wallets and keys, after which one or more of the suspects took said property from  
20 J. CHRISTOPHER BROWN.

21 COUNT V - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

22 TANIKO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston, did, on or  
23 about July 27, 1993, then and there wilfully, unlawfully, and feloniously attempt to take personal  
24 property, to-wit: a 1987 Pontiac Firebird, bearing Nevada License No. 03195N, from the person of J.  
25 CHRISTOPHER BROWN or in his presence, by means of force or violence, or fear of injury to, and  
26 without the consent and against the will of the said J. CHRISTOPHER BROWN, and/or demanding said  
27 property, said Defendants, DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS,  
28 using a deadly weapon, to-wit: a firearm, during the commission of said crime, in the following manner,

1 to-wit: the said Defendants, DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS,  
2 aiding or abetting each other by counsel and encouragement and by entering into a course of conduct  
3 whereby TANIKO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO  
4 WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and  
5 Defendant RICHARD CHARLES GASTON, aka Ricco Gaston acting as lookout, and Defendants,  
6 DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS, approached MARIO  
7 WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and  
8 one or more of the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down,  
9 while demanding their wallets and keys, after which one or more of the suspects attempted to take said  
10 vehicle, but could not get it started.

11 COUNT VI - ATTEMPT GRAND LARCENY AUTO

12 TANIKO CURT SMITH and RICHARD CHARLES GASTON, aka Rico Gaston did, on or  
13 about July 27, 1993, then and there wilfully, unlawfully, and feloniously, with intent to deprive the owner  
14 permanently thereof, attempt to steal, take, and drive away the motor vehicle of J. CHRISTOPHER  
15 BROWN, to-wit: a 1987 Pontiac Firebird, bearing Nevada License No. 03195N, in the following manner,  
16 to-wit: the said Defendants, DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS,  
17 aiding or abetting each other by counsel and encouragement and by entering into a course of conduct  
18 whereby TANIKO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO  
19 WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and  
20 Defendant RICHARD CHARLES GASTON, aka Ricco Gaston acting as lookout, and Defendants,  
21 DARNELL DEANDRE ROBINSON and RODNEY MANUEL HARRIS, approached MARIO  
22 WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and  
23 one or more of the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down,  
24 while demanding their wallets and keys, after which one or more of the suspects attempted to take said  
25 vehicle, but could not get it started.

26 It is the duty of the jury to apply the rules of law contained in these instructions to the facts of  
27 the case and determine whether or not the Defendant is guilty of the offense charged.

28 Each charge and the evidence pertaining to it should be considered separately. The fact that you may find

1 a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to  
2 any other offense charged against TANI KO CURT SMITH.

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INSTRUCTION NO. 4

An Amended Information as to RODNEY MANUEL HARRIS is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Amended Information that on between July 27, 1993, and August 4, 1993, the Defendants committed the offenses of **MURDER WITH USE OF A DEADLY WEAPON** (Felony - NRS 200.010, 200.030, 193.165); **ATTEMPT MURDER WITH USE OF A DEADLY WEAPON** (Felony - NRS 200.010, 200.030, 193.330, 193.165); **ROBBERY WITH USE OF A DEADLY WEAPON** (Felony - NRS 200.380, 193.165); **ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON** (Felony - NRS 200.380, 193.330, 193.165); and **ATTEMPT GRAND LARCENY AUTO** (Felony - NRS 205.220, 193.330).

COUNT I - MURDER WITH USE OF A DEADLY WEAPON

did, on or between July 27, 1993, and August 4, 1993, then and there, without authority of law and with malice aforethought, wilfully and feloniously kill MARIO WESLEY, a human being, by shooting at and into the neck and/or head of the said MARIO WESLEY with a deadly weapon, to-wit: a firearm, resulting in the death of the said MARIO WESLEY, on August 4, 1993, the said Defendant, RODNEY MANUEL HARRIS, , along with DARNELL DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH being responsible under the following theories of criminal liability, to-wit: (1) Premeditation; (2) Felony Murder; Defendant and DARNELL DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH committed the murder in the perpetration or attempted perpetration of robbery; (3) Aiding or Abetting; the said Defendant along with DARNELL DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH aiding or abetting each other by counsel and encouragement and by entering into a course of conduct whereby RICHARD CHARLES GASTON and DARNELL DEANDRE ROBINSON left May-B's Restaurant, then TANIKO CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and Defendant RODNEY MANUEL HARRIS, , DARNELL DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH approached MARIO WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and one or more of

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1 the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down, while demanding  
2 their wallets and keys, after which one or more of the suspects shot the said MARIO WESLEY.

3 COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

4 did, on or about July 27, 1993, then and there, without authority of law and malice aforethought,  
5 wilfully and feloniously attempt to kill J. CHRISTOPHER BROWN, a human being, by shooting at and  
6 into the legs of the said J. CHRISTOPHER BROWN with a deadly weapon, to-wit: a firearm, in the  
7 following manner, to-wit: the said Defendant RODNEY MANUEL HARRIS, , DARNELL DAENDRE  
8 ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH aiding or abetting each  
9 other by counsel and encouragement and by entering into a course of conduct whereby RICHARD  
10 CHARLES GASTON and DARNELL DEANDRE ROBINS left May-B's Restaurant, then TANIKO  
11 CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO WESLEY and J.  
12 CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and Defendant  
13 RODNEY MANUEL HARRIS, , DARNELL DEANDRE ROBINSON, RICHARD CHARLES  
14 GASTON and TANIKO CURT SMITH approached MARIO WESLEY and J. CHRISTOPHER  
15 BROWN, and one or more of the suspects displayed said firearm, and one or more of the suspects  
16 ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down, while demanding their wallets  
17 and keys, after which one or more of the suspects shot the said J. CHRISTOPHER BROWN.

18 COUNT III - ROBBERY WITH USE OF A DEADLY WEAPON

19 did, on or about July 27, 1993, then and there wilfully, unlawfully, and feloniously take personal  
20 property, to-wit: wallet and/or lawful money of the United States and/or jewelry, from the person of  
21 MARIO WESLEY, or in his presence, by means of force or violence, or fear of injury to, and without  
22 the consent of the said MARIO WESLEY, said Defendant RODNEY MANUEL HARRIS, , and  
23 DARNELL DEANDRE ROBINSON using a deadly weapon, to-wit: a firearm, during the commission  
24 of said crime, in the following manner, to-wit: the said Defendant RODNEY MANUEL HARRIS, ,  
25 DARNELL DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANIKO CURT SMITH  
26 aiding or abetting each other by counsel and encouragement and by entering into a course of conduct  
27 whereby RICHARD CHARLES GASTON and DARNELL DEANDRE ROBINSON left May-B's  
28 Restaurant, and followed the said MARIO WESLEY and J. CHRISTOPHER BROWN outside to the

1 vehicle of J. CHRISTOPHER BROWN, and Defendant RODNEY MANUEL HARRIS, , DARNELL  
2 DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANI KO CURT SMITH approached  
3 MARIO WESLEY and J. CHRISTOPHER BROWN, and one or more of the suspects displayed said  
4 firearm, and one or more of the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN  
5 to lay down, while demanding their wallets and keys, after which one or more of the suspects shot the  
6 said J. CHRISTOPHER BROWN.

7 COUNT IV - ROBBERY WITH USE OF A DEADLY WEAPON

8 did, on or about July 27, 1993, then and there wilfully, unlawfully, and feloniously take personal  
9 property, to-wit: wallet and/or lawful money of the United States and/or jewelry, from the person of J.  
10 CHRISTOPHER BROWN, or in his presence, by means of force or violence, or fear of injury to, and  
11 without the consent and against the will of the said J. CHRISTOPHER BROWN, said Defendant  
12 RODNEY MANUEL HARRIS, , and DARNELL DEANDRE ROBINSON using a deadly weapon, to-  
13 wit: a firearm, during the commission of said crime, in the following manner, to-wit: the said Defendant  
14 RODNEY MANUEL HARRIS, , DARNELL DAENDRE ROBINSON, RICHARD CHARLES  
15 GASTON and TANI KO CURT SMITH aiding or abetting each other by counsel and encouragement and  
16 by entering into a course of conduct whereby RICHARD CHARLES GASTON and DARNELL  
17 DEANDRE ROBINSON left May-B's Restaurant, and followed the said MARIO WESLEY and J.  
18 CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and Defendant  
19 RODNEY MANUEL HARRIS, , DARNELL DAENDRE ROBINSON, RICHARD CHARLES  
20 GASTON and TANI KO CURT SMITH approached MARIO WESLEY and J. CHRISTOPHER  
21 BROWN, and one or more of the suspects displayed said firearm, and one or more of the suspects  
22 ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down, while demanding their wallets  
23 and keys, after which one or more of the suspects shot the said J. CHRISTOPHER BROWN.

24 COUNT V - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

25 did, on or about July 27, 1993, then and there wilfully, unlawfully, and feloniously attempt to take  
26 personal property, to-wit: 1 1987 Pontiac Firebird, bearing Nevada License No. 03195N, from the person  
27 of J. CHRISTOPHER BROWN, or in his presence, by means of force or violence, or fear of injury to,  
28 and without the consent and against the will of the said J. CHRISTOPHER BROWN, and/or by



1 demanding said property, said Defendant RODNEY MANUEL HARRIS, , and DARNELL DEANDRE  
2 ROBINSON using a deadly weapon, to-wit: a firearm, during the commission of said crime, in the  
3 following manner, to-wit: the said Defendant RODNEY MANUEL HARRIS, , DARNELL DAENDRE  
4 ROBINSON, RICHARD CHARLES GASTON and TANI KO CURT SMITH aiding or abetting each  
5 other by counsel and encouragement and by entering into a course of conduct whereby RICHARD  
6 CHARLES GASTON and DARNELL DEANDRE ROBINSON left May-B's Restaurant, then TANI KO  
7 CURT SMITH locked the door to May-B's Restaurant and followed the said MARIO WESLEY and J.  
8 CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER BROWN, and Defendant  
9 RODNEY MANUEL HARRIS, , DARNELL DAENDRE ROBINSON, RICHARD CHARLES  
10 GASTON and TANI KO CURT SMITH approached MARIO WESLEY and J. CHRISTOPHER  
11 BROWN, and one or more of the suspects displayed said firearm, and one or more of the suspects  
12 ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down, after which one or more of  
13 the suspects attempted to take said vehicle, but could not get it started.

14 COUNT VI - ATTEMPT GRAND LARCENY AUTO

15 did, on or about July 27, 1993, then and there wilfully, unlawfully, and feloniously, with intent  
16 to deprive the owner permanently thereof, attempt to steal, take, and drive away the motor vehicle of  
17 J. CHRISTOPHER BROWN, to-wit: a 1987 Pontiac Firebird, bearing Nevada License No. 03195N,  
18 in the following manner, to-wit: the said Defendant RODNEY MANUEL HARRIS, , DARNELL  
19 DEANDRE ROBINSON, RICHARD CHARLES GASTON and TANI KO CURT SMITH  
20 aiding or abetting each other by counsel and encouragement and by entering into a course of conduct  
21 whereby RICHARD CHARLES GASTON and DARNELL DEANDRE ROBINSON left May-B's  
22 Restaurant, then TANI KO CURT SMITH locked the door to May-B's Restaurant and followed the said  
23 MARIO WESLEY and J. CHRISTOPHER BROWN outside to the vehicle of J. CHRISTOPHER  
24 BROWN, and Defendant RODNEY MANUEL HARRIS, DARNELL DEANDRE ROBINSON,  
25 RICHARD CHARLES GASTON and TANI KO CURT SMITH approached MARIO WESLEY and J.  
26 CHRISTOPHER BROWN, and one or more of the suspects displayed said firearm, and one or more of  
27 the suspects ordered MARIO WESLEY and J. CHRISTOPHER BROWN to lay down, after which one  
28 or more of the suspects attempted to take said vehicle from J. CHRISTOPHER BROWN, but could not

1 get it started.

2 Each charge and the evidence pertaining to it should be considered separately. The fact that you  
3 may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict  
4 as to any other offense charged against RODNEY MANUEL HARRIS.

5 It is the duty of the jury to apply the rules of law contained in these instructions to the facts of  
6 the case and determine whether or not the Defendants are guilty of the offenses charged.

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INSTRUCTION NO. 5

1  
2 The evidence which you are to consider in this case consists of the testimony of the  
3 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

4 There are two types of evidence; direct and circumstantial. Direct evidence is the  
5 testimony of a person who claims to have personal knowledge of the commission of the crime  
6 which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain  
7 of facts and circumstances which tend to show whether the Defendant is guilty or not guilty.  
8 The law makes no distinction between the weight to be given either direct or circumstantial  
9 evidence. Therefore, all of the evidence in the case, including the circumstantial evidence,  
10 should be considered by you in arriving at your verdict.

11 Statements, arguments and opinions of counsel are not evidence in the case. However,  
12 if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence  
13 and regard that fact as proved.

14 You must not speculate to be true any insinuations suggested by a question asked a  
15 witness. A question is not evidence and may be considered only as it supplies meaning to the  
16 answer.

17 You must disregard any evidence to which an objection was sustained by the court and  
18 any evidence ordered stricken by the court.

19 Anything you may have seen or heard outside the courtroom is not evidence and must  
20 also be disregarded.

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INSTRUCTION NO. 6

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

EOR1228

INSTRUCTION NO. 7

1  
2 A witness who has special knowledge, skill, experience, training or education in a  
3 particular science, profession or occupation is an expert witness. An expert witness may give  
4 his opinion as to any matter in which he is skilled.

5 You should consider such expert opinion and weigh the reasons, if any, given for it. You  
6 are not bound, however, by such an opinion. Give it the weight to which you deem it entitled,  
7 whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for  
8 it are unsound.

EOR1229

INSTRUCTION NO. 8

1  
2 The Defendant is presumed innocent until the contrary is proved. This presumption  
3 places upon the State the burden of proving beyond a reasonable doubt every material element  
4 of the crime charged and that the Defendant is the person who committed the offense.

5 A reasonable doubt is one based on reason. It is not mere possible doubt but is such a  
6 doubt as would govern or control a person in the more weighty affairs of life. If the minds of  
7 the jurors, after the entire comparison and consideration of all the evidence, are in such a  
8 condition that they can say they feel an abiding conviction of the truth of the charge, there is not  
9 a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

10 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict  
11 of not guilty.  
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EOR1230

INSTRUCTION NO. 9

1  
2 You are here to determine the guilt or innocence of the Defendant from the evidence in  
3 the case. You are not called upon to return a verdict as to the guilt or innocence of any other  
4 person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of  
5 the Defendant, you should so find, even though you may believe one or more persons are also  
6 guilty.

EOR1231

INSTRUCTION NO. 10

1  
2 Although you are to consider only the evidence in the case in reaching a verdict, you must  
3 bring to the consideration of the evidence your everyday common sense and judgment as  
4 reasonable men and women. Thus, you are not limited solely to what you see and hear as the  
5 witnesses testify. You may draw reasonable inferences from the evidence which you feel are  
6 justified in the light of common experience, keeping in mind that such inferences should not be  
7 based on speculation or guess.

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



INSTRUCTION NO. 11

In your deliberation you may not discuss or consider the subject of punishment. Your duty is confined to the determination of the guilt or innocence of the Defendant.

EOR1233

INSTRUCTION NO. 12

1  
2 If, during your deliberation, you should desire to be further informed on any point of law  
3 or hear again portions of the testimony, you must reduce your request to writing signed by the  
4 foreperson. The officer will then return you to court where the information sought will be given  
5 you in the presence of, and after notice to, the district attorney and the Defendant and his  
6 counsel.

7 Readbacks of testimony are time-consuming and are not encouraged unless you deem it  
8 a necessity. Should you require a readback, you must carefully describe the testimony to be read  
9 back so that the court reporter can arrange his notes. Remember, the court is not at liberty to  
10 supplement the evidence.

EOR1234

INSTRUCTION NO. 13

To constitute the crimes charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

EOR1235

INSTRUCTION NO. 14

1  
2 Murder is the unlawful killing of a human being, with malice aforethought, either express or  
3 implied. The unlawful killing may be effected by any of the various means by which death may be  
4 occasioned.

EOR1236

INSTRUCTION NO. 14(a)

Any kind of willful, deliberate and premeditate killing with malice aforethought is Murder of the First Degree.

Premeditation is a design, a determination to kill, formed in the mind of the killer at any moment before or at the time of killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing was preceded by and is the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Premeditation is a question of fact for the jury and may be determined from the facts and circumstances of the killing, such as the use of an instrument calculated to produce death, the manner of the use and the circumstances surrounding the act.

EOR1237

INSTRUCTION NO. 15

Malice aforethought, as used in the definition of Murder, means the intentional killing of another human being without legal cause, legal excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may rise, not alone from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another which proceeds from a heart fatally bent on mischief or with reckless disregard of consequence and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention, but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

EOR1238

INSTRUCTION NO. 16

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

EOR1239

INSTRUCTION NO. 17

1  
2 There are certain kinds of murder which carry with them conclusive evidence of malice  
3 aforethought. One of these classes of murder is murder committed in the perpetration or attempted  
4 perpetration of robbery. Therefore, a killing which is committed in the perpetration of robbery is deemed  
5 to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This  
6 is called the Felony-Murder rule.

7 The Felony-Murder rule may be applied to this case even though the Defendant has not been charged  
8 with the crime of Robbery.

9 The specific intent to perpetrate or attempt to perpetrate  
10 robbery must be proven beyond a reasonable doubt.

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INSTRUCTION NO. 17(a)

Where the purpose of the criminal act is to commit the dangerous felony of Robbery, each individual runs the risk of having the venture end in homicide. Hence, each is guilty of murder if one of them commits homicide in the perpetration of an agreed upon robbery.

EOR1241

INSTRUCTION NO. 18

You are instructed that if you find a defendant guilty of Murder of the First Degree, you must also determine whether or not a deadly weapon was used in the commission of this crime.

EOR1242

INSTRUCTION NO. 19

A deadly weapon is any object, instrument or weapon which is use in such a manner as to be capable of producing, or is likely to produce, death or great bodily injury.

You are instructed that a gun is a deadly weapon, and proof of its deadly capabilities is not required.

EOR1243

INSTRUCTION NO. 20

If you find beyond a reasonable doubt that a defendant committed Murder of the First Degree With the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the First Degree With the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the First Degree Without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the First Degree With the Use of a Deadly Weapon and Murder of the First Degree Without the Use of a Deadly Weapon.

EOR1244

INSTRUCTION NO. 21

1  
2 The offense of First Degree Murder, with which the defendant is charged in the Indictment,  
3 necessarily includes the lesser offense of Second Degree Murder.

4 If the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser  
5 included offense, but you entertain a reasonable doubt as to which of the offenses the defendant is guilty,  
6 it is your duty to find him guilty only of the lesser offense.

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INSTRUCTION NO. 22

Murder of the Second Degree is murder with malice aforethought, but without the admixture of premeditation.

Any murder which is not Murder of the First Degree is Murder of the Second Degree.

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INSTRUCTION NO. 23

You are instructed that if you find a defendant guilty of Murder of the Second Degree you must also determine whether or not a deadly weapon was used in the commission of this crime.

EOR1247

INSTRUCTION NO. 24

If you find beyond a reasonable doubt that a defendant committed Murder of the Second Degree With the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the Second Degree With the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the murder, but you do find that a murder was committed, then you are instructed that the verdict of Murder of Second Degree Without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the Second Degree With the Use of a Deadly Weapon and Murder of the Second Degree Without the Use of a Deadly Weapon.

EOR1248



INSTRUCTION NO. 25

1  
2 The elements of an attempt to commit a crime are: 1) the intent to commit the crime; 2)  
3 performance of some act towards its commission; and 3) failure to consummate its commission.

4 In determining whether or not such an act was done, it is necessary to distinguish between  
5 mere preparation, on the one hand, and the actual commencement of the doing of the criminal  
6 deed, on the other. Mere preparation, which may consist of planning the offense or of devising,  
7 obtaining or arranging the means for its commission, is not sufficient to constitute an attempt;  
8 but acts of a person who intends to commit a crime will constitute an attempt where they  
9 themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in  
10 themselves, are an immediate step in the present execution of the criminal design, the progress  
11 of which would be completed unless interrupted by some circumstance not intended in the  
12 original design.

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EOR1249

INSTRUCTION NO. 26

1  
2 While it is true the overt act ought to be a direct unequivocal act done toward the commission  
3 of the offense, whenever the design of a person to commit a crime is clearly shown, slight acts  
4 done in furtherance thereof will constitute an attempt.  
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EOR1250

INSTRUCTION NO. 27

1  
2 When a person has once done things which constitute an attempt to commit a crime, he cannot  
3 avoid responsibility by failing to proceed further to commit that crime, either by reason of  
4 voluntarily abandoning his purpose or because he was prevented or interfered with in completing  
5 the crime.

EOR1251

INSTRUCTION NO. 28

An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.

EOR1252

INSTRUCTION NO. 29

The elements of an attempt to commit murder are:

- 1) the intent to commit the murder;
- 2) performance of some act towards its commission; and
- 3) failure to consummate its commission.

EOR1253

INSTRUCTION NO. 30

You are instructed that if you find the defendant guilty of Attempt Murder you must also determine whether or not a deadly weapon was used in the commission of this crime.

EOR1254

INSTRUCTION NO. 31

If you find beyond a reasonable doubt that a defendant committed Attempt Murder with the Use of a Deadly Weapon, then you are instructed that the verdict of Attempt Murder with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Attempt Murder, but you do find that an Attempt Murder was committed, then you are instructed that the verdict of Attempt Murder without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Attempt Murder with the Use of a Deadly Weapon and Attempt Murder without the Use of a Deadly Weapon.

INSTRUCTION NO. 32

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate of future, to his person or property. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.



INSTRUCTION NO. 33

1  
2 In order to constitute robbery, the taking must be accomplished either by force or intimidation,  
3 this element being the gist and distinguishing characteristic of the offense; but there need not be force  
4 and intimidation, either being sufficient without the other.  
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EOR1257

INSTRUCTION NO. **34**

1  
2 It is unnecessary to prove both violence and intimidation. If the fact be attended with circumstances  
3 of threatening word or gesture as in common experience is likely to create an apprehension of danger and  
4 induce a man to part with his property for the safety of his person, it is robbery. It is not necessary to  
5 prove actual fear, as the law will presume it in such a case.  
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EOR1258

INSTRUCTION NO. 35

If you find the defendant guilty of robbery, you must also determine whether or not a deadly weapon was used in the commission of this crime.

EOR1259

INSTRUCTION NO. 36

1  
2 If you find beyond a reasonable doubt that a defendant committed Robbery, then you are  
3 instructed that the verdict of Robbery is the appropriate verdict.

4 If, however, you find that a deadly weapon was not used in the commission of the robbery, but  
5 you do find that a robbery was committed, then you are instructed that the verdict of Robbery Without  
6 the Use of a Deadly Weapon is the appropriate verdict.

7 You are instructed that you cannot return a verdict of both Robbery With the Use of a Deadly  
8 Weapon and Robbery.

INSTRUCTION NO. 37

A person who attempts to steal, take or drive away the motor vehicle of another with the specific intent to deprive him permanently of his property, is guilty of the crime of Attempt Grand Larceny.

EOR1261

INSTRUCTION NO. 38

1  
2 If you find that the defendant attempted to take the automobile with the intent to appropriate it  
3 to his own use and with intent to abandon later the automobile in such circumstances as would render  
4 its recovery by the owner difficult or unlikely, then you may find that the attempted taking was with the  
5 specific intent to permanently deprive the owner of the property.  
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EOR1262

INSTRUCTION NO. 39

1  
2 Mere presence at the scene of a crime or knowledge that a crime is being committed  
3 is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond  
4 reasonable doubt that the defendant was a participant and not merely a knowing spectator.

5 However, the presence of a person at the scene of a crime and companionship with  
6 another person engaged in the commission of the crime and a course of conduct before and  
7 after the offense are circumstances which may be considered in determining whether such  
8 person aided and abetted the commission of that crime.

EOR1263

INSTRUCTION NO. 40

1  
2 The flight of a person immediately after the commission of a crime, or after he is accused of a  
3 crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by  
4 you in light of all other proved facts in deciding the question of his guilt or innocence. The weight to  
5 which such circumstance is entitled is a matter for the jury to determine.

EOR1264



INSTRUCTION NO. 41

The Defendants have been charged with alternative counts of Attempt Robbery With Use of a Deadly Weapon and Attempt Grand Larceny Auto. The Defendants may only be convicted of either Attempt Robbery With Use of a Deadly Weapon or Attempt Grand Larceny Auto, they may not be convicted of both Attempt Robbery With Use of a Deadly Weapon and Attempt Grand Larceny Auto.

EOR1265

INSTRUCTION NO. 42

1  
2           It is a constitutional right of a defendant in a criminal trial that he may not be compelled to  
3 testify. Thus the decision as to whether he should testify is left to the defendant on the advice and  
4 counsel of his attorney. You must not draw any inference of guilt from the fact that he does not  
5 testify, nor should this fact be discussed by you or enter into your deliberations in any way.  
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EOR1266

INSTRUCTION NO. 43

1  
2 Evidence which tends to show that the defendant committed offenses other than that for  
3 which he is on trial, if believed, was not received and may not be considered by you to prove that he  
4 is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence  
5 was received and may be considered by you only for the limited purpose of proving the defendant's  
6 preparation, intent, motive, plan, knowledge, identity or the absence of mistake or accident. You  
7 must weigh this evidence in the same manner as you do all other evidence in the case.  
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EOR1267

INSTRUCTION NO. 44

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime.

The state is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

INSTRUCTION NO. 45

1  
2  
3 A separate crime is charged against each defendant. The  
4 charges and the defendants have been joined for trial. You must  
5 consider and decide the case of each defendant separately. Your  
6 verdict as to one defendant should not control you verdict as to  
7 any other defendant.

8 All of the instructions apply to each defendant (unless a  
9 specific instruction states that it applies to only one of the  
10 defendants).  
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EOR1269

INSTRUCTION NO. 46

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3       You are instructed that certain evidence has been introduced  
4 relative to a carjacking of a pickup truck at Savon Drugs on or  
5 about July 16, 1993.

6       In your deliberations, you are not to consider such evidence  
7 against Rodney Harris.  
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EOR1270

INSTRUCTION NO. 47

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesman here in court.

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

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

EOR1271

INSTRUCTION NO. 48

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

GIVEN: 

DISTRICT JUDGE

EOR1272