IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH SIMON JEREMIAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67228

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(a)(1) because it is a direct appeal from a Judgment of Conviction imposing the death penalty.

STATEMENT OF THE ISSUES

I. Whether any challenge premised upon Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), is waived.

II. Whether Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), does not require application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances.

III. Whether any alleged Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), error is harmless.

STATEMENT OF THE CASE

The State incorporates the Statement of the Case in Respondent's Answering Brief. (Respondent's Answering Brief (RAB), filed April 28, 2016, p. 2-5). The State's Answering Brief was filed on April 28, 2016. Id. Appellant replied to the State's pleading. (Appellant's Reply Brief, filed July 8, 2016). On November 17, 2016, Appellant sought leave to file a supplemental brief. (Motion for Leave to File Supplemental Brief, filed November 17, 2016). This Court ordered supplemental briefing on January 24, 2017. (Order Granting Motion, filed January 24, 2017). Appellant's supplemental pleading was filed on January 24, 2017. (Appellant's Supplemental Brief (ASB), filed January 24, 2017).

STATEMENT OF THE FACTS

The State incorporates the Statement of the Facts in Respondent's Answering Brief. (RAB, p. 5-17).

SUMMARY OF THE ARGUMENT

Any challenge to the penalty-phase selection / weighing instruction premised upon Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), was waived by Appellant's failure to offer timely objection based upon Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). Further, reversal is not required because Apprendi, Ring and Hurst do not apply to the weighing of aggravating against mitigating circumstances since such a moral

judgment is not a factual determination. Appellant's demand for automatic reversal as structural error is unwarranted as that standard is inapplicable to Hurst error. Rather, the appropriate standard of review is harmless error if plain error does not apply. Regardless, there was no plain error and any error was harmless.

ARGUMENT

I
ANY CHALLENGE PREMISED UPON HURST v. FLORIDA, 577 U.S. __, 136 S.Ct. 616 (2016), IS WAIVED

Appellant admits that he failed to object to the penalty-phase burden of proof instruction. (ASB, p. 2). This failure is fatal.

Appellant's failure to argue below that the jury needed to be instructed during the penalty-phase that the beyond a reasonable doubt standard applies to the weighing of aggravating against mitigating circumstances waives all but plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Thomas v. Hardwick, 126 Nev. __, __, 231 P.3d 1111, 1120 (2010); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Regardless of whether error is structural, plain error review applies. Puckett v. United States, 556 U.S. 129, 140, 129 S. Ct. 1423, 1432 (2009) (reserving whether "structural errors" automatically satisfy plain error); United States v. Kieffer, 681 F.3d 1143, 1158 (10th Cir. 2012)

("[a] defendant failing to object to structural error in the district court likely would still need to establish that an error was plain and seriously affected the fairness, integrity, or public reputation of the judicial proceedings").

That Hurst post-dated the penalty hearing does not prohibit a finding of waiver. See, Crump v. State, 2016 Nev. Unpub. Lexis 374, p. 6-7, footnote 5 ("Riley[v. McDaniel, 786 F.3d 719 (9th Cir. 2015),] would not provide good cause as it relies on Hern[v. State, 97 Nev. 529, 635 P.2d 278 (1981)], which has been available for decades").[1] While it is undisputable that Hurst was published in 2016, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, Appellant should have preserved this claim of error by offering objection premised upon Ring.

II
HURST v. FLORIDA, 577 U.S. __, 136 S.Ct. 616 (2016), DOES NOT REQUIRE APPLICATION OF THE BEYOND A REASONABLE DOUBT STANDARD TO THE WEIGHING OF AGGRAVATING AGAINST MITIGATING CIRCUMSTANCES

[1] Citation to the unpublished opinions in Crump as persuasive authority is permissible. NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."); MB America Inc. v. Alaska Pacific Leasing Company, 123 Nev. Ad. Op. 8, 15, n.1 (Feb. 4, 2016) (allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

Appellant cannot demonstrate plain error because the selection phase of a capital sentencing proceeding is not an element of any offense and is not subject to the beyond a reasonable doubt standard since such a moral judgment is not a factual determination.

As noted above, Appellant's failure to object to the penalty-phase weighing instruction waives all but plain error. Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Appellant demands that this Court invalidate Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011), on the basis of Hurst because he erroneously believes that the selection phase of the capital sentencing procedure is an element of an offense that must be proven beyond a reasonable doubt. (ASB, p. 4-19). However, this Court has stated that "'[w]e are loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. ___, ___, 318 P.3d 1063, 1065 (2014) (quoting, Armenta-Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013). This Court should

cleave to Nunnery because Hurst does not hold that the weighing of aggravating against mitigating circumstances is an element subject to the beyond a reasonable doubt standard.

Nevada capital penalty proceedings comply with the requirements of Apprendi, Ring and Hurst since a jury determines death eligibility using the beyond a reasonable doubt standard:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

Once the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt, thereby establishing death eligibility, the question becomes one of determining the appropriate punishment. However, this second step "is not part of the narrowing aspect of the capital sentencing process. Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what [this Court] has referred to as the selection phase of the capital sentencing process." Lisle v. State, 131 Nev. ___, ___, 351 P.3d 725, 732 (2015).

Appellant complains that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum' qualifies as an element that 'must be submitted to a jury, and proved beyond a reasonable doubt.'" (ASB, p. 6 (quoting, Ring, 530 U.S. at 490, 120 S.Ct. 2348, 2362-63 (2000)). Appellant's citation to Ring is correct as far as it goes, however, it does not elevate Nevada's selection phase to an element because it is only the death eligibility finding that subjects a capital defendant to the threat of increased punishment. Nunnery, 127 Nev. at 772, 263 P.3d at 251. Nevada's weighing process cannot be an element that increases the possible punishment because mitigating circumstances operate as an affirmative defense that can preclude a death sentence once a defendant is found eligible for capital punishment. A capital defendant in Nevada can be sentenced to death if the jury finds no mitigating circumstances at all. Id. Death is even an option in the 50/50 situation because mitigation must outweigh aggravation. Id. at 777, 263 P.3d at 254. Mitigation is irrelevant to death eligibility and only comes into play once the decision to increase a capital defendant's exposure to additional possible punishment has already been made. As such, the selection phase is not an element under Ring.

Nor is the weighing of mitigation against aggravation subject to the beyond a reasonable doubt standard. This Court has already concluded that the selection phase is not a factual determination and is not subject to the beyond a reasonable doubt standard. Nunnery, 127 Nev. 749, 772-76, 263 P.3d at 251-53. This Court

reached this conclusion in the context of a Ring and Apprendi challenge to the omission of the beyond a reasonable doubt standard from Nevada's weighing instruction. Id.

Nevada has long rejected any attempts to apply a reasonable doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the reasonable doubt standard does not apply to this individualized decision by the jurors: "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (*citing* Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989)); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond a reasonable doubt standard is permissible because the states enjoy a broad range of

discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S.Ct. 2516, 2525 (2006) (*citing* Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320 (1988)). "Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047 (1990).

Appellant offers several equally flawed arguments designed to wrongly expand the scope of Apprendi, Ring and Hurst. Appellant begins by misstating the holding of Hurst. Appellant contends that Hurst "clarified for the first time that, where the weighing of facts in aggravation and mitigation is a precursor to a death sentence, the Sixth Amendment requires the State to prove this element to a jury, beyond a reasonable doubt." (ASB, p. 5 (*citing*, Hurst, 577 U.S. at __, 136 S.Ct. at 621-22)). However, Hurst simply does not stand for that proposition. The portion of Hurst cited by Appellant set out the statutory prerequisites for imposing a sentence

of death and noted that Florida law required that those findings be made by a judge. Hurst, 577 U.S. at __, 136 S.Ct. at 622. The Court pointed out that the role of the jury under Florida law was advisory only. Id. Indeed, the Court specifically limited the scope of Hurst to aggravating circumstances when setting out the actual holding:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. *Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional*.

Id. at __, 136 S.Ct. at 624 (emphasis added).

Perhaps the strongest reason to reject Appellant's dubious construction of Hurst is how the Supreme Court dealt with its own precedent in Hurst. Hurst cited Walton without overruling it. Hurst, 577 U.S. at __, 136 S.Ct. at 622. This is interesting because Appellant's warped interpretation of Hurst concludes that "the State must prove, beyond a reasonable doubt, that the mitigating circumstances do not outweigh the aggravating circumstances." (ASB, p. 1). This is in direct conflict with Walton:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, *a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances* sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650, 110 S.Ct. 3047, 3055 (1990) (emphasis added). If the United States Supreme Court intended the holding Appellant attributes to Hurst, the

Court would have addressed this direct conflict. Indeed, where Walton conflicted with Ring the United States Supreme Court squarely addressed the issue and overruled Walton in part. Ring, 536 U.S. at 609, 122 S.Ct. at 2443 ("we overrule Walton to the extent that it allows a sentencing judge … to find an aggravating circumstance necessary for imposition of the death penalty.").

Similarly, in overruling Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055 (1989), and Spanziano v. Florida, 468 U.S. 477, 104 S.Ct. 3154 (1984), Hurst stated, "[t]he decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty." Hurst, 577 U.S. at __, 136 S.Ct. at 624. If the Supreme Court intended Hurst to apply to more than aggravating circumstances it would have said so in addressing these precedents. That the Court specifically limited the invalidation of Hildwin and Spanziano to aggravating circumstances clearly brings into question the legitimacy of Appellant's position.

Appellant next turns to an irrelevant examination of the Florida Supreme Court's decision on remand in Hurst. (ASB, p. 8-9). It is true that the Florida Supreme Court concluded that the "specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Hurst

v. State, 202 So.3d 40, 44 (Fla. 2016). However, the Florida Supreme Court's overbroad interpretation of Hurst on remand after being reversed is not binding on this Court. Custom Cabinet Factory of New York, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 119 Nev. 51, 54, 62 P.3d 741, 742-43 (2003); Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 500(1987). More importantly, it is contradicted by existing authority from this Court. Nunnery, 127 Nev. 749, 772-76, 263 P.3d at 251-53.

Appellant's reliance upon Raulf v. State, 145 A.3d 430 (Del. 2016), is equally problematic. Raulf is a tortured opinion that reached consensus only on conclusions. Id. at 432-34. However, when asked whether Hurst applied retroactively, the Delaware Supreme Court distinguished Raulf from Hurst. Powell v. State, 2016 Del. LEXIS 649, p. 9 (Del. 2016) ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof.").[2] It is important to note that the burden of proof issue that the Delaware Supreme Court said was not at issue in Ring and Hurst but controlling in Raulf is the entire point of Appellant's Hurst argument. (ASB, p. 1 ("the State must prove,

[2] The questionable nature of the Delaware Supreme Court's Hurst jurisprudence is further demonstrated by Powell's conclusion that Delaware's precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell, 2016 Del. LEXIS 649, p. 10-11. Such overreaching is dubious because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006).

beyond a reasonable doubt, that the mitigating circumstances do not outweigh the aggravating circumstances."). Appellant's citation to Raulf is highly questionable because only a few months after Raulf the Delaware Supreme Court distinguished Raulf from Hurst on the very burden of proof issue for which Appellant relies upon Raulf as support for his Hurst argument.

While Appellant offers pre-Hurst authority in an attempt to recycle arguments related to Ring and Apprendi his post-Hurst authority is limited to Raulf and the Florida Supreme Court's remand opinion in Hurst. Appellant almost totally ignores the weight of appellate authority concluding that Hurst was a mere application of Ring. Davila v. Davis, 650 Fed.Appx. 860, 872-73 (5th Cir. 2016) (on appeal of district court's rejection of argument that Texas' death penalty statute was "unconstitutional … because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt" the Court concluded that "[r]easonable jurists would not debate the district court's resolution, even after Hurst."); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive a defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of the aggravating circumstances or findings beyond a reasonable doubt that an aggravating

circumstance … has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. … Nothing in Hurst … affects our conclusions in this regard."); Ex parte Bohannon, 2016 Ala. LEXIS 114, p. 15 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio-8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring.").

Appellant's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. The United States Supreme Court allowed the rejection of Appellant's argument by the California and Alabama Supreme Courts to stand. If the High Court intended the expansionist reading of Hurst suggested by Appellant certiorari would have been granted to give guidance to the lower courts. Conversely, Appellant's suggestion that remand with instruction to consider Hurst in Kirksey v. Alabama, __ U.S. __, 136 S.Ct. 2409 (2016), Wimbley v. Alabama, __ U.S. __, 136 S.Ct. 2387 (2016), and Johnson v. Alabama, __ U.S. __, 136 S.Ct. 1837 (2016), supports his interpretation of Hurst is utterly unpersuasive since the underlying decisions in those cases were reached prior to the publication of Hurst. Kirksey v. State, 191 So.3d 810 (Ala. Crim. App. 2014); Wimbley v. State, 191

So.3d 176 (Ala. Crim. App. 2014); Johnson v. State, 2015 Ala. Crim. App. LEXIS 3 (Ala. Crim. App. 2015).

Ultimately, that the United States Supreme Court saw Hurst as a mere application of Ring is made clear by the plain text of the opinion:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst, 577 U.S. at __, 136 S.Ct. at 622.

Accordingly, Hurst imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

III
ANY ALLEGED HURST v. FLORIDA, 577 U.S. __, 136 S.Ct. 616 (2016), ERROR IS HARMLESS

Hurst error is not structural because Hurst was a mere application of Ring and Ring error is not structural. As with Ring error, preserved Hurst error should be reviewed for harmlessness. Regardless, there was no error and any error does not warrant reversal.

Initially, this Court need not address whether Hurst error is structural since even structural error is reviewed only for plain error where an appellant fails to object below. Puckett, 556 U.S. at 140, 129 S. Ct. at 1432 (reserving whether

"structural errors" automatically satisfy plain error); Kieffer, 681 F.3d at 1158 ("[a] defendant failing to object to structural error in the district court likely would still need to establish that an error was plain and seriously affected the fairness, integrity, or public reputation of the judicial proceedings"). As demonstrated above, Appellant has failed to demonstrate any error no less plain error.

Regardless, Hurst error is not structural. "Structural errors compromise 'the framework of a trial.'" Barral v. State, 131 Nev. __, 353 P.3d 1187, 1198 (2015), cert. denied, __ U.S. __, 136 S.Ct. 2542 (2016) (quoting, Brass v. State, 128 Nev. __, __, 291 P.3d 145, 148 (2012)). "Such errors mandate routine reversal because they are 'intrinsically harmful.'" Id. (quoting, Brass, 128 Nev. at __, 291 P.3d at 148 (quoting, Cortinas v. State, 124 Nev. 1013, 1024 195 P.3d 315, 322 (2008))). As noted above, Hurst was a mere application of Ring. As such, Hurst error is not structural error because Ring error is not structural. Murdaugh v. Ryan, 724 F.3d 1104, 1116 (9th Cir. 2013), cert. denied, __ U.S. __, 134 S.Ct. 2840 (2014) ("it is now well settled that Ring error is subject to the harmless error test[.]"); State v. Ring, 204 Ariz. 534, 555, 65 P.3d 915, 936 (2003) ("Arizona's failure to require a trial judge to submit the aggravating circumstances to a jury does not constitute structural error.").

Thus, had Appellant preserved his challenge to the penalty-phase instruction the proper standard of review would have been harmless error. "Any error, defect,

irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

As argued above, there was no Hurst error so reversal is unwarranted regardless of the standard. If there was Hurst error it was harmless. As Appellant admits, the jury was properly instructed on the need to apply the beyond a reasonable doubt standard to the finding of aggravating circumstances. (14 Record on Appeal (ROA) 3064; ASB, p. 1). The State presented powerful evidence in support of the aggravating circumstances, including that Appellant murdered two people in cold blood. The jury was also instructed on the low threshold for establishing mitigating circumstances and that any juror individually could preclude a sentence of death based upon his or her personal evaluation of aggravating and mitigating circumstances. (14 RPA 3064). These instructions collectively impose an

incredibly high standard for imposing a sentence of death. The alleged failure to marginally raise this burden is of such questionable value that it must be harmless.

The harmlessness of any Hurst error is further seen in the unworkable standard Appellant peddles. Appellant contends that "the State must prove, beyond a reasonable doubt, that the mitigating circumstances do not outweigh the aggravating circumstances." (ASB, p. 1). This amounts to demanding that the State prove a negative, rarely a legitimate standard and almost never an achievable goal. More importantly, any benefit to imposing such a standard is likely already had through imposing the beyond a reasonable doubt standard on aggravating circumstances while allowing an incredibly permissible and low standard for the finding of mitigation and the rejection of a death sentence by any juror individually. Indeed, the unworkability and questionable value of Appellant's proposed standard likely caused the United States Supreme Court to limit Hurst to the aggravating circumstances:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst, 577 U.S. at __, 136 S.Ct. at 622.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment below be AFFIRMED.

Dated this 6th day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points contains 4,268 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of February, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 6, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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