IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH SIMON JEREMIAS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 67228

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court No. C256769

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

JoNell Thomas
State Bar #4771
Chief Deputy Special Public Defender
David M. Schieck
State Bar #0824
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Ralph Jeremias

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

STATUTORY AUTHORITY

OTHER AUTHORITY

I. INTRODUCTION

Appellant Ralph Jeremias respectfully submits that this Court's decision in Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011), must be overruled under Hurst v. Florida, 136 S.Ct. 616 (2016), insofar as Nunnery held that the weighing of aggravating and mitigating circumstances is not subject to the beyond a reasonable doubt standard of proof. Nunnery, 127 Nev. at 772, 263 P.3d at 250-51. Jeremias was entitled, under the Sixth and Fourteenth Amendments to the United States Constitution, to a penalty phase jury instruction which informed the jury that before it may return a sentence of death, the State must prove, beyond a reasonable doubt, that the aggravating circumstances equal or outweigh the mitigating circumstances.

II. REPLY TO THE STATE'S ARGUMENT

A. Jeremias Did Not Waive This Issue, and this Court Should Consider The Merits

Appellant Jeremias contends that this Court should consider whether Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251 (2011) should be overruled under Hurst v. Florida, 136 S.Ct. 616 (2016). In the Supplemental Brief, Jeremias acknowledged that his counsel did not object to the jury instruction concerning the weighing of aggravating and mitigating standards. He argued that this Court should nevertheless address his claim because of the intervening authority of Hurst v.

Florida, which was issued after the trial in this case. Although a Hurst claim was not available to Jeremias during his penalty phase, the State urges a finding of waiver, arguing that a Hurst claim is no different than a Ring claim, which Jeremias could have raised. Supplemental Answering Brief at 4. To accept that argument, however, the Court would have to consider the merits of the claim and agree with the State that Hurst and Ring are constitutionally indistinguishable. The State, therefore, cannot rely on this rationale to prevent the Court from considering the merits altogether.

The State's response also fails to acknowledge that because Hurst had not been decided yet, Jeremias could not predict that he would have any grounds to ask this Court to revisit its decision in Nunnery. Because of the lack of higher authority, there was also no legal basis for the trial court to sustain an objection to its jury instructions, contrary to Nunnery's holding. Where, as here, an objection made at the time of trial would have been futile, this Court has declined to find waiver. See, e.g., Bejarano v. State, 122 Nev. 1066, 1071, 1073, 146 P.3d 265, 269, 270 (2006) (good cause existed for failure to raise McConnell issue in previous proceedings or in the district court below because "a claim pursuant to that decision was not reasonably available to Bejarano"); Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175, 177 (1998) (finding cause for failure to raise issue because "it would have been futile for [the defendant] to object"); Jones v. State, 101 Nev. 573, 576, 707 P.2d 1128, 1130

(1985) (finding cause for failure to raise issue given "the futility of objecting to an instruction whose validity has been consistently upheld"); St. Pierre v. State, 96 Nev. 887, 892, 620 P.2d 1240, 1243 (1980) ("Cause' for appellant's failure to object is demonstrated by the fact that objection would have been futile as the imposition of the burden of persuasion on a defendant had been upheld by this court on prior occasions."); Bean v. State, 86 Nev. 80, 85-86, 465 P.2d 133, 136 (1970) (finding good cause to excuse failure to raise Witherspoon issue at trial or on direct appeal, therefore, "there is no merit to the defendant's failure to object in the trial court to the exclusion of the member as a bar to the present claim of error.").

In any event, both parties acknowledge that this Court has the authority to consider this issue as a matter of plain error. Supplemental Answering Brief at 3-4. See Johnson v. United States, 520 U.S. 461, 468 (1997); Martinorellan v. State, 343 P.3d 590, 593 (Nev. 2015) (adopting Johnson plain error standard for unpreserved constitutional errors).

B. This Court's Opinion In Nunnery Must Be Overruled Under New Authority From the United States Supreme Court in Hurst v. Florida

Jeremias contends that, because 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, it directly conflicts with Nunnery, The State's objection to this conclusion relies on two faulty propositions: (1) that, in Nevada, weighing is not an "eligibility" criterion but rather a "selection" consideration, and (2) that weighing is not factual. The first directly contravenes Nevada precedent, and the second cannot survive Hurst.

1. Under Nevada law, the weighing determination is a finding that renders a defendant eligible for the death penalty

The State's repeated insistence that weighing is a "selection phase" determination that does not act to increase the maximum penalty for first-degree murder to death, see, e.g., Supplemental Answering Brief at 5, 6-7, directly conflicts with over thirty years of this Court's precedent. It is well-established that Nevada law incorporates a two-part death-eligibility determination. See Servin v. State, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001) ("In order to determine that a defendant is eligible for the death penalty, (1) the jury must unanimously find, beyond a reasonable doubt, at least one enumerated aggravating circumstance; and (2) each juror must then individually determine that mitigating circumstances, if any exist, do not outweigh the aggravating circumstances. At this point, a defendant is death-eligible . . ."); Evans v. State, 117 Nev. 609, 634, 28 P.3d 498, 515 (2001) ("in deciding whether to return a death sentence, the jury can consider [other matter]

evidence only after finding the defendant death-eligible, i.e. after it has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators."). overruled on other grounds, Lisle v. State, 351 P.3d 725, 732 n.5 (Nev. 2015); Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000) ("Under Nevada's capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and *each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating.")*, overruled on other grounds, Lisle, 351 P.3d at 732 n.5;Geary v. State, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998) (same). See also Middleton v. State, 114 Nev. 1089, 1117, 968 P.2d 296, 315 (1997) ("the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible"); Geary v. State, 110 Nev. 261, 267, 871 P.2d 927, 931 (1994) (describing two conditions for death eligibility, including the weighing of mitigating and aggravating circumstances); Canape v. State, 109 Nev. 864, 882, 859 P.2d 1023, 1035 (1993) (finding that the weighing determination was a prerequisite to finding the defendant death eligible); Gallego v. State, 101 Nev. 782, 790-91, 711 P.2d 856, 862-63 (1985) (describing the weighing process as part of the two-step eligibility decision which satisfies the

narrowing requirement of the Eighth Amendment). See also Hurst, 136 S.Ct. at 622, quoting § 921.141(3), Fla. Stat. ("the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court'* … '[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"). The State's brief simply ignores all of this precedent.

Instead, the State relies on this Court's opinion in Lisle v. State, 351 P.3d 725, 732 (Nev. 2015), in support of its argument. The State confuses Nevada's long-standing definition of death eligibility, which requires both the finding of one or more aggravators and the finding that mitigation does not outweigh the aggravation, with the death eligibility determination at issue in habeas corpus cases involving successive and untimely petitions for which the defendant claims actual innocence of the death penalty as a gateway to reach a procedurally defaulted claim. In the post-conviction actual innocence cases, this Court focuses on the objective factors of eligibility, that is, the aggravators and does not allow a procedurally defaulted claim to be grounded in new evidence of mitigation. Lisle, 351 P.3d at 733 (Nev. 2015). Lisle was based upon the Supreme Court's opinion in Sawyer v. Whitley, 505 U.S. 333 (1992), and was premised on the conclusion that the elements of a capital offense and the aggravators are "objective factors or conditions," which provide a workable

standard for applying the actual-innocence gateway in the context of a death sentence." Lisle, 351 P.3d at 733-34 (quoting Sawyer, 505 U.S. at 347).

Lisle was issued on the same day as Burnside v. State, a case on direct appeal which did not employ the Lisle standard in addressing the death penalty eligibility based upon an invalid aggravator, but instead recited Nevada's long-standing eligibility determination, which involves both the finding of at least one aggravator and the weighing of aggravating and mitigating evidence. Burnside v. State, 352 P.3d 627, 646 (Nev. 2015). The only way to reconcile the two opinions is to recognize that Lisle applies in habeas cases involving a gateway claim of actual innocence, and that Nevada's statutes and long-standing case authority, defining eligibility as including the finding of one or more aggravators and the finding that mitigation does not outweigh the aggravating, are controlling in other contexts. See NRS 175.554(3) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."). This is wholly consistent with not only Burnside, but also with the fact that in Lisle this Court did not overrule Servin, Geary, Evans, Hollaway and other long-standing authority on this issue. The State's argument that Lisle overruled three decades of case authority

sub silento is unfathomable and reflects a fundamental misunderstanding of Nevada's death penalty scheme.[1]

2. Hurst v. Florida acknowledged that weighing is a factual finding that falls under the Sixth Amendment's umbrella

The State disputes that Hurst requires a re-examination of Nunnery by claiming first, that Hurst only addressed statutory aggravating circumstances, not weighing, see Supplemental Answering Brief at [cite] and second, that weighing is a moral rather than factual determination, see Supplemental Answering Brief at [cite]. Both are refuted by the plain text of Hurst.

The State's brief presents a narrow and incomplete analysis of Hurst v. Florida, 136 S.Ct. 616, and, therefore, reaches an incorrect conclusion. The State's argument is, in essence, that Hurst is indistinguishable from Ring v. Arizona, 536 U.S. 584 (2002). The State claims that, since this Court concluded, without the benefit of Hurst, that Ring did not require that the relative weight of aggravating and mitigating circumstances be proven beyond a reasonable doubt, the same must be true today. See Supplemental Answering Brief at 7-8, citing Nunnery, 127 Nev. 749, 263 P.3d 235.

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[1]Even if the State were somehow correct in its argument that under Lisle, the only eligibility factor for the death penalty was the finding of aggravating circumstances, it would be a constitutional violation to apply this new rule, from 2015, to this case, which was charged in 2009. Bouie v. Columbia, 378 U.S. 347, 353-54 (1954); Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 945 (1998).

This analysis is faulty and incomplete. By selectively citing narrow language from Hurst that obscures the thrust of the Court's opinion, the State ignores the broader constitutional rule explicated therein.

Contrary to the impression created by the State's incomplete analysis, in Hurst, the United States Supreme Court identified constitutional infirmities in Florida's capital sentencing scheme extending beyond the judicial determination of a single aggravating circumstance. The Court clearly noted that, under the Florida statute, the judge made multiple findings that were statutorily necessary to a death sentence:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [State v.] Steele, 921 So.2d [538,] 546 [(Fla. 2005)].

Hurst, 136 S.Ct. at 622. Because all of these findings combined to establish the factual prerequisite for a death sentence in Florida, it was impermissible for the judge, rather than the jury, to make them. Id.

As explained more fully in the Supplemental Brief, the State's cited language from Hurst, "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional," Hurst, 136 S.Ct. at 624, is not the beginning and end of its import. This language resolved the

precise challenge raised by the petitioner, which focused on the court's determination of an aggravating circumstance, but did not define the scope of the constitutional rule the Court applied to do so. That rule, which has much broader impact, is plain: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619 (emphasis added).

To conclude that the Hurst opinion is simply a regurgitation of Ring v. Arizona perverts and improperly minimizes its significance. It also creates a false internal conflict between the specific holding of Hurst, which pointedly resolved the question presented concerning the judicial determination of an aggravating circumstance, and its explication of the constitutional basis for that holding, that the Florida statute impermissibly allocated to the court several factual findings necessary to a death sentence, including the finding that there were "sufficient aggravating circumstances" to justify a death sentence and "insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. at 622. Because the State's interpretation of Hurst cannot explain or account for this aspect of the decision, it essentially asks this Court to ignore it. However, Hurst is not just a restatement of Ring. Instead, it has illuminated the breadth of what the Sixth Amendment requires in a death penalty case.

Neither can weighing any longer be viewed, as the State suggests, as a moral determination that falls outside the ambit of the Sixth Amendment. The reasoning of Hurst, cited above, which extends Ring to determinations about the relative weight of aggravating and mitigating circumstances, refutes this claim. The Nevada statute, like the Florida statute addressed in Hurst, does not permit the jury to make its sentencing determination using any metric it finds appropriate, based on its subjective judgment, or as a reflection of the jury's morality. Compare, e.g., Ga. Code Ann. § 17-10-30 (death sentencing statute only requires that, in making its sentencing determination, jury must "consider … any mitigating circumstances or aggravating circumstances"). Rather, it requires that the jury's ultimate decision reflect the facts in aggravation and mitigation, as they were established by the parties during sentencing. That the weighing process also involves an exercise of judgment does not exempt it from the Sixth Amendment. The ultimate judgment required by the Nevada statute is one premised on facts. An evaluation of the relative weight of aggravating and mitigating circumstances cannot be divorced from the underlying determinations that the jury must make regarding which circumstances have been proven, to what degree, and what significance that proof carries for the appropriate penalty in the case.

Both the Florida Supreme Court and the Delaware Supreme Court reached this exact conclusion regarding the scope of the Sixth Amendment following Hurst. See Hurst v. State, 202 So.3d 40, 44 (Fla. 2016); Rauf v. State, 145 A.3d 430, 434 (Del. 2016).[2] The State asserts that the Florida Supreme Court's interpretation of the United States Supreme Court's decision in Hurst is not binding upon this Court. Supplemental Answering Brief at 11-12. Jeremias agrees, but the authority is persuasive and should be considered by this Court as it evaluated this issue.

The State also disagrees with the decision of the Delaware Supreme Court in Rauf, 145 A.3d 430.[3] Supplemental Answering Brief at 12. The State asserts that it is a tortured opinion that reached a consensus only on the conclusions. This is not a fair reading of the Rauf decision, which contained a per curiam opinion, as well as two concurrences that were all joined by a majority of the Court. See Rauf, 145 A.3d at 432, 434, 482. That majority clearly concluded that the weighing determination under Delaware law was a Sixth Amendment finding that must be proven to a unanimous jury, beyond a reasonable doubt. Id. at 434.

In addition to its attacks on the judgment of Florida and Delaware's highest courts, the State also attempts to support its conclusions by citing to Eighth

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[2]This same conclusion was recently reached by a magistrate in a federal district court in Ohio. Gapen v. Bobby, 2017 WL 661493 (S.D. Ohio, 2/17/2017).

[3]The State repeatedly refers to the case as "Raulf," the correct name is "Rauf."

Amendment cases, including Kansas v. Marsh, 548 U.S. 163, 175 (2006), and Walton v. Arizona, 497 U.S. 639, 650 (1990). Supplemental Answering Brief at 8-9, 10-11. This authority, however, is entirely irrelevant to the question before this Court.

While Hurst applied the Sixth Amendment to a particular death penalty statute, Marsh and Walton addressed what the Eighth Amendment requires in every death penalty case. Though the requirements of the Sixth and Eighth Amendments sometimes interact, they are distinct. The Eighth Amendment, which requires that the death penalty is only imposed on "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution,'" Roper v. Simmons, 543 U.S. 551, 558 (2005) quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002), governs the substance of what all death penalty statutes must include. The Sixth Amendment's scope, on the other hand, is wholly determined by the terms of the statute being analyzed. Whenever a legislature chooses to make a factual finding necessary to an enhanced sentence, the Sixth Amendment requires that the finding be made by a unanimous jury, beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 475 (2000) (Apprendi's Sixth Amendment claim concerned the "adequacy of New Jersey's procedure," not the "substantive basis" for the statute or "the strength of state interests that are served.").

While Walton and Marsh, as the State contends, may suggest that the Nevada legislature was not required, under the Eighth Amendment, to include a weighing determination in its capital statute, that provision is nevertheless present. As Justice Scalia's concurrence in *Ring* acknowledged, it is irrelevant to the Sixth Amendment analysis why a particular factual finding appears in statutory text or whether that finding is required by the Eighth Amendment. Ring v. Arizona, 536 U.S. 584, 610-611 (2002) (Scalia, J., concurring). As long as the elements are in the statute, they are subject to the Sixth Amendment's requirements. Id. at 612 ("[W]hether or not the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury *beyond a reasonable doubt*.").[4]

C. The Sixth Amendment Error requires Reversal of Jeremias' Death Sentence

The State next argues that any Hurst error is harmless, and urges this Court to nevertheless affirm Jeremias' death sentence. Supplemental Answering Brief at 15.

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[4]While the State also argues that Jeremias's reading of Hurst is undermined by the denial of certiorari in cases out of California and Alabama, see Answering Brief at 14, the denial of certiorari has no precedential effect. Hopfmann v. Connolly, 471 U.S. 459, 461 (1985).

First, the State entirely fails to acknowledge or respond to Jeremias' argument that, that, because the jury failed to find each element of the crime of capital murder beyond a reasonable doubt, reversal is required. See Supplemental Brief at 19-20. Second, even if the harmless error standard of review applies here, the State's conclusory claims cannot satisfy its burden.

A constitutional error may only be harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Cortinas v. State, 124 Nev. 1013, 1027, 195 P.3d 315, 324 (2008), quoting Chapman v. California, 386 U.S. 18, 24 (1967). The State does not attempt to meet this burden with citation to actual facts or circumstances in this case. Instead, it rests its argument entirely on the purported insignificance of the "beyond a reasonable doubt" standard of proof. The State claimed assigning the "beyond a reasonable doubt" standard of proof to a determination which, under current law, is subject to no particular standard at all, will only "marginally" raise it, and would be "of such questionable value that it must be harmless." Supplemental Answering Brief at 18. The fault in the State's argument is apparent, as it casually discards one of the fundamental tenets of constitutional due process. The reasonable doubt standard is not of "questionable value", it is "indispensable, for it impresses on the trier of fact the necessity of

reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364 (1970) (internal quotation and citations omitted).

III. CONCLUSION

For the reasons set forth herein, this Court should find that its decision in Nunnery is no longer valid under the controlling authority by the United States Supreme Court in Hurst v. Florida, find that the penalty verdicts here must be reversed, and remand this case for a new penalty trial.

DATED this 21st day of February, 2017

Respectfully submitted,

/s/ JONELL THOMAS

By:_____

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 8x in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(B)(I). The brief is 4,384 words.

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

DATED this 21st day of February, 2017

/s/ JONELL THOMAS

_____

JoNell Thomas
Nevada Bar No. 4771

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 21st day of February, 2017, a copy of the Appellant's Supplemental Reply Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS

JONELL THOMAS