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 PETITION FOR REHEARING

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Comes now Appellant Ralph Jeremias, by and through his counsel, JoNell Thomas, and respectfully requests rehearing, pursuant to NRAP 40, of this Court's Opinion, filed on March 1, 2018.

Jeremias was sentenced, pursuant to a jury verdict, to death for two counts of first-degree murder with use of a deadly weapon. Following full briefing and oral argument, this Court, sitting en banc, entered an Opinion affirming the judgment. Jeremias respectfully submits that this Court misapprehended the facts, overlooked controlling legal authority, and failed to consider issues that were presented in his appeal. Rehearing should be granted for each of these reasons.

This Court did not address an important issue concerning the admission of testimonial hearsay evidence during the penalty phase of the trial.

In the Opening Brief, Jeremias raised an issue which was wholly unaddressed by this Court in its Opinion:

> I. The district court violated Jeremias's constitutional rights of cross-examination and confrontation by allowing testimonial hearsay evidence to be admitted during the penalty trial.

OB pp. 107-115. The State addressed this issue in its Answering Brief at pp. 74-79. This issue was also addressed in the Reply Brief at pp. 45-49. This issue was preserved at trial. 13 ROA 2746-48 (Jeremias's objection to the admission of hearsay

evidence); 15 ROA 3157-58 (district court overruled the objection and allowed an instruction which stated that "Hearsay is admissible in a penalty hearing.").

Related issues were presented concerning the admission of evidence from an interrogation of Jeremias's co-defendant, Ivan Rios, and the admission of gun possession evidence. See Opening Brief at pp. 100-107, 115-18. This Court summarily rejected these two issues, but did not address the hearsay evidence presented as Issue "I".[1] Jeremias submits that rehearing should be granted so that this Court may address this important constitutional issue.

This Court overlooked controlling legal authority in resolving the issue of exclusion of Jeremias' family from the courtroom during jury selection.

Jeremias raised an issue on direct appeal concerning the district court's exclusion of Jeremias' family from jury selection, in violation of Presley v. Georgia, 558 U.S. 209 (2010). OB 44-47. Following briefing in this case, the United States

[1]In resolving the other issues, this Court concluded: "Jeremias raises other challenges to his penalty phase that he did not preserve below. Specifically, he argues that (1) the district court violated his rights to confrontation and notice by admitting Rios' statements to law enforcement, (2) the district court violated his Second Amendment right to bear arms by admitting evidence that he was found in possession of firearms during several arrests, and (3) the prosecutor committed misconduct during the penalty phase. The first two grounds require little discussion as Jeremias fails to demonstrate plain error affecting his substantial rights." Opinion at pages 16-17. The hearsay evidence addressed in Issue "I" includes Rios's statements and the arrest reports concerning gun possession, but also included additional hearsay evidence, Opening Brief 107-115.

Supreme Court issued an opinion in Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), which addressed a Presley issue in the context of a claim of ineffective assistance of counsel based upon counsel's failure to object to the courtroom closure at trial and failure to raise the issue on direct appeal. Jeremias noticed Weaver as supplemental authority. In ruling against Jeremias on this issue, based upon trial counsel's failure to object, this Court found Weaver to be controlling. This Court did not address Weaver's explanation of why a case is different on direct appeal than it is on habeas review:

> Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories to still be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.
>
> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk . . . and direct review often has given at least one opportunity for review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.

Id. at 1912. Jeremias respectfully submits that rehearing should be granted so that this Court may consider this important aspect of the Weaver opinion.

This case falls between Presley and Weaver in that the issue of the courtroom closure was not the subject of a proper objection at trial (though it was clear that Jeremias' family wished to attend, they were told they could not, and Jeremias was not asked to waive his right to a public trial) but the issue was raised on direct appeal. There has not been a great time elapse since the first trial and there is no indication that physical evidence has been lost. Most critically, this Court has a supervisory responsibility over the lower courts which would be fulfilled by consideration of the merits of this issue on direct appeal. Presley was issued by the United States Supreme Court in 2010. In 2014, the experienced prosecutor objected to the presence of family members of the defendant in the courtroom during voir dire and the district court ordered the closure based upon capacity concerns, in clear violation of Presley. While trial counsel should have objected, the prosecutor and the judge should have also followed the binding, recent, and well established authority of the United States Supreme Court which should have prohibited the closure in this case. The differences between this Court's review on direct appeal and the review of a court in habeas corpus proceedings were noted by the United States Supreme Court in Weaver and warrant this Court's reconsideration under NRAP 40.

This Court misapprehended the record in considering an issue involving expert witness testimony

In his Opening Brief, Jeremias contended that the district court abused its discretion by permitting law enforcement witnesses to give expert witness testimony about fragments of plastic. OB at 76-84. In ruling against Jeremias on this issue, this Court found:

> Jeremias, however, did not contemporaneously object on this ground; although he objected on this basis before trial, the district court instructed him to lodge objections to the specific portions of the testimony that he believed required an expert, which he did not do. Similarly, on appeal he quotes large portions of testimony regarding the plastic fragments without identifying the specific statements that allegedly required an expert. . . .

Opinion at pg. 14. The record and the briefs do not support this conclusion. Trial counsel, in fact, made contemporaneous objections to this testimony. See e.g. 8 ROA 1761 (objection to speculation and foundation to a crime scene analyst's testimony that the black plastic looked as though it had been torn by a bullet); 8 ROA 1805 (objection to detective's testimony that because no cartridge casings were found at the scene, there was a potential, based upon the plastic found at the scene, that a bag was used to capture the cartridge cases as they expended from the gun). Likewise, the specific testimony at issue was described in the Opening Brief at pages 78-80. A lengthy discussion was provided as to the testimony about the plastic that should have

been provided through only an expert witness, and the State's witnesses were not qualified to render expert opinions. Opening Brief at 82-83. See also Reply Brief at 23 ("The testimony here was not lay testimony. The testimony by the crime scene analyst that the pieces of plastic looked like they had been torn by a bullet, and that he could make this determination based upon their shape, size, texture and location at the scene, went far beyond the common knowledge of the average layperson and was beyond the realm of everyday experience. The testimony here was not the result of a process of reasoning familiar in everyday life. Likewise, his opinion that this was something involving high velocity and power, that had gone through a blast, was not within the realm of lay testimony."). Rehearing should be granted so that this Court may consider the record and briefs concerning this issue.

This Court misapprehended the law in addressing the impact of Hurst v. Florida on Nevada's death penalty scheme.

In affirming Jeremias's conviction, this Court twice acknowledged the doctrine of *stare decisis* and the principle that reconsideration of previous decisions should not be overturned absent compelling reasons for doing so. See Opinion pg. 16 (declining to reconsider Burnside v. State, 352 P.3d 627, 638 (Nev. 2015), on the issue of Nevada's reasonable doubt instruction, under the doctrine of *stare decisis*); Id. (refusing to reconsider a broad interpretation of an aggravating circumstance) (citing

Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008)). In Burk, this Court considered the constitutionality of ballot questions and relied on the doctrine of *stare decisis* in declining to overturn prior decisions in the absence of compelling reasons for doing so:

> "These decisions now hold positions of permanence in this court's jurisprudence – precedent that, under the doctrine of *stare decisis*, we will not overturn absent compelling reasons for so doing. Mere disagreement does not suffice. Thus, as no party has pointed to "weighty and conclusive" reasons for negating the voters' decade-long expectation that term limits, whenever effective are a policitical reality . . .

Id. Despite the prominence of the *stare decisis* doctrine in ruling against Jeremias on certain issues, this Court did not acknowledge or follow the doctrine when considering an issue about the nature of Nevada's death penalty scheme and the impact of Hurst v. Florida, 136 S.Ct. 616 (2016) on that scheme.

For over 30 years, or the entirety of Nevada's modern death penalty jurisprudence, this Court, and the Nevada Legislature, have defined our death penalty scheme as involving two determinations for death penalty eligibility, and one determination for whether the death penalty should be selected. 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."); NRS 200.030(4)

("A person convicted of murder of the first degree is guilty of a category A felony and shall be punished (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances found . . .); 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); Canape v. State, 109 Nev. 864, 878-82, 859 P.2d 1023, 1029-35 (1993) (explaining that "'A Nevada sentencer must consider and weigh both mitigating and aggravating circumstances before it can determine whether a defendant is eligible for the death penalty,'" and finding that the weighing determination was a prerequisite to finding the defendant death eligible) (quoting Deutscher v. Whitley, 991 F.2d 605, 606-07 (9th Cir. 1993) and citing NRS 200.030(4)(a)); 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); Bennett v. State, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995) ("the death penalty is only a sentencing *option* if, after balancing and evaluating the aggravating and mitigating circumstances, the former are found to outweigh the latter); 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"); 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.") (*citing Geary v. State, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998); NRS 175.554(2), (3); NRS 175.556), overruled on other grounds, Lisle, 351 P.3d at 732 n.5; 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); 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 . . ."); Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002) ("Nevada

statutory law requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges 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.") (quoting NRS 175.554(3) and citing Hollaway), overruled on other grounds, Nunnery v. State, 127 Nev. 749, 771-72, 263 P.3d 235, 250-51 (2011); Archanian v. State, 122 Nev. 1019, 1041, 145 P.3d 1008, 1024 (2006) (noting that the defendant was eligible for a death sentence based upon the finding of an aggravating circumstance and the weighing of the aggravating and mitigating circumstances); Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 283-84 (2006) (distinguishing Nevada's death penalty scheme from California's scheme and explaining that an invalid aggravating circumstance in Nevada skews the eligibility decision, based upon the weighing of aggravating and mitigating circumstances, even if the factors would be relevant in deciding subsequently whether a death-eligible defendant actually should receive a death sentence); Johnson v. State, 122 Nev. 1344, 1348- 50,148 P.3d 767, 770-71 (2006) (describing a bifurcated penalty trial in which evidence of aggravating and mitigating circumstances were presented during the eligibility phase of the trial, and other matter evidence was presented during the selection phase); Burnside v. State,

352 P.3d 627, 646 (Nev. 2015) (noting that the weighing determination is part of the eligibility determination).

Despite three decades of consistent case authority and no changes in the governing statutes (NRS 175.554, NRS 200.030(4)(a)), in Lisle v. State, 351 P.3d 725 (Nev. 2015), this Court found, in the context of an untimely, successive habeas petition and a claim of actual innocence, that eligibility for the death penalty would only be reconsidered, in the absence of good cause, and prejudice, if the petitioner demonstrated a fundamental miscarriage of justice, meaning the imprisonment of a person who is actually innocent of the offense for which he was convicted, or the execution of a person who is actually innocent of the death penalty. Id. at 727. Within that context, this Court defined "actual innocence of the death penalty" as excluding new evidence of mitigating circumstances and instead requiring a focus on the elements of first-degree murder and the aggravating circumstances. Id. The issue was presented as an issue of first impression and was resolved based upon the United States Supreme Court's decision in Sawyer v. Whitley, 505 U.S. 333 (1992), which addressed the actual innocence gateway while considering Lousiana's capital sentencing scheme. Lisle, 351 P.3d at 732-33. The remainder of the Lisle opinion addressed the actual innocence claim within that context, but did not purport to change Nevada's death penalty scheme for all contexts.

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 legitimate 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, set forth at length above, define 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. This is consistent not only with Burnside, but also with the fact that this Court did not explicitly overrule 30 years of well established precedent in Lisle.

"The doctrine of *stare decisis* is an indispensable principle necessary to this court's jurisprudence and to the due administration of justice. That doctrine holds that 'a question once deliberately examined and decided should be considered settled.'" State v. Harte, 124 Nev. 969, 977-78, 194 P.3d 1263, 1268-69 (2008) (2008) (Hardesty, J. concurring) (quoting Stocks v. Stocks, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947)). Rehearing should be granted so that this Court may reconsider this important issue.

Even if Lisle did in fact overrule 30 years of precedent by holding 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) (due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue); Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) (*ex post facto* principles apply to the judicial branch through the Due Process Clause, which prohibits a judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue). Rehearing should be granted so that this Court may address why its decision in Lisle is applied retroactively to the charges at issue here.

Finally, rehearing should be granted because of this Court's erroneous reliance on Kansas v. Carr, 136 S.Ct. 633 (2016), in support of its conclusion that Hurst v. Florida does not warrant relief in this case. Opinion at pg. 20. The Supreme Court's decision in Carr does not alter the Hurst analysis. Carr was an Eighth Amendment case in which the Supreme Court addressed and rejected the defendant's contention that his death sentence was invalid because the jury was not explicitly instructed that

it did not need to find that mitigating circumstance existed beyond a reasonable doubt because the circumstances could be considered. Id. at 642-44. The Court in Carr was not called upon to address the weighing of mitigating and aggravating circumstances because the Eighth Amendment does not require states to have statutory schemes in which the jury must "balance aggravating against mitigating circumstances pursuant to any special standard." Zant v. Stephens, 462 U.S. 862, 873-74 (1983). The Court in Carr also had no occasion to address the penalty phase weighing instructions because "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate[.]" Kansas v. Marsh, 548 U.S. 163, 173 (2006). See also Carr, 136 S.Ct. at 643 (noting that the Kansas "instruction makes clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt . . ."). This Court erred in relying on Carr as authority for what the Sixth Amendment requires, especially given that the Kansas statutory scheme already required the weighing determination to be made by a jury under a reasonable doubt standard.

Carr is also inapposite because the weighing determination in Kansas is part of the selection phase of a capital sentencing hearing. Carr, 136 S. Ct. at 642; Marsh,

548 U.S. at 174. As a consequence, a Kansas jury considers intangible factors such as mercy when conducting its weighing determination in order to select the appropriate sentence. Id. Unlike Kansas, the weighing determination in Nevada is part of the death eligibility phase of the sentencing proceeding. NRS 175.554(3);NRS 200.030(4), and authority cited above. Only after the jury finds a defendant death eligible is it permitted to consider other matter evidence pertaining to his/her character and to make a moral judgment regarding the appropriate sentence. NRS 175.552(3). The intangible factors cited in Carr that comprise the moral judgment of the sentencer – and that make weighing less of a factual determination – do not exist when a Nevada jury conducts its eligibility weighing determination. The factual differences between the death penalty statute in Kansas and the Nevada capital sentencing scheme render Carr inapplicable.

Application of Hurst v. Florida to Nevada's capital sentencing scheme warrants a finding that the jury instructions here failed to properly apply the State's burden of proof to the weighing determination. Rehearing should be granted on this basis.

Rehearing Is Warranted

Pursuant to NRAP 40, rehearing is warranted based upon the issues and facts . . .

which were overlooked in this Court's opinion. In addition, the Opinion does not address controlling legal authority on a number of issues.

DATED this 12th day of March, 2018.

Respectfully submitted,

/s/ JONELL THOMAS
By:_____

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

1. I hereby certify this Petition for Rehearing does comply with the formatting requirements of NRAP 32(a)(4)-(6).

2. I hereby certify that this Petition for Rehearing does comply with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition for Rehearing has been prepared in a proportionally spaced typeface using Word Perfect Office X8 in 14 point font of the Times New Roman style.

3. I hereby certify that this Petition for Rehearing does comply with the word limitation requirement of NRAP 40(b)(3). The relevant portions of the Petition are 3,801 words.

4. Finally, I hereby certify that I have read this Petition for Rehearing, 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 Petition for Rehearing 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 Petition for Rehearing is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of March, 2018.

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on March 12, 2018, a copy of the foregoing Appellant's Petition for Rehearing was served as follows:

BY ELECTRONIC FILING TO

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/s/ JONELL THOMAS

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