IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT YBARRA, JR, Appellant, vs. TIMOTHY FILSON, Warden, et. al, Respondents.	Supreme Court No. 72942 District Court Case No. HC-1702005 (Death Penalty Habeas Corpus Case)

APPELLANT'S OPENING BRIEF

Appeal From
Seventh Judicial District Court, White Pine County
The Honorable Steve L. Dobrescu, District Judge

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Case No. 72942

ROBERT YBARRA, JR.,

Appellant,

v.

TIMOTHY FILSON, Warden, et. al,

Respondent.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. During pretrial proceedings, Mr. Ybarra was represented by Martin H. Weiner and Steven G. McGuire, of the Nevada State Public Defender Office.
2. During trial and sentencing proceedings, Mr. Ybarra was represented by Steven G. McGuire and Norman Y. Herring, of the Nevada State Public Defender Office.

3. During the direct appeal, Mr. Ybarra was represented by Gregory Damm, Laura Fitzsimmons, and Robert A. Bork, of the Nevada State Public Defender Office.

4. During state post-conviction proceedings, Mr. Ybarra was represented by J. Thomas Susich and William Crowell, Jr.

5. During subsequent habeas proceedings, Mr. Ybarra was represented by Patrick N. Flanagan, Glynn Cartledge, Annabell Hall, and Edward Horn.

6. Since May of 2000, Mr. Ybarra has been represented by the Federal Public Defender for the District of Nevada.

/s/ *Randolph M. Fiedler*
ATTORNEY
Attorney of record for CLIENT

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I. JURISDICTIONAL STATEMENT

This is an appeal from a district court decision denying Ybarra's petition for writ of habeas corpus in a capital case, Seventh Judicial District Case No. HC-1702005. The District Court entered its Notice of Entry of Order on March 31, 2017. Ybarra timely filed a Notice of Appeal on April 27, 2017. 7 AA 1657-60. This Court has appellate jurisdiction over this appeal pursuant to NRS 34.575(1), 34.830, 177.015(1)(b), and 177.015(3).

II. ROUTING STATEMENT

This case is retained by the Supreme Court because it is a capital case. NRAP 17(a)(2).

III. STATEMENT OF THE ISSUES

1. Does the Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), invalidate Nevada's capital sentencing scheme with respect to the jury's outweighing procedure because it requires that the outweighing decision be made by the jury beyond a reasonable doubt as an element of capital eligibility, regardless of how this Court labels it?

2. Does the finding of the unconstitutional depravity of mind aggravating circumstance render Ybarra's death sentence unconstitutional?

3. Does the rule announced in Hurst, that the outweighing decision in a weighing state is an element of capital eligibility, apply retroactively on collateral review, as a watershed procedural rule because it involves the burden of proof beyond a reasonable doubt or as a substantive rule of law?

4. Did the District Court err by concluding that Ybarra's petition was procedurally barred under NRS 34.726 and 34.810 when the state petition in this case was filed within one year of the decision in Hurst and Ybarra has established a miscarriage of justice?

IV. STATEMENT OF THE CASE

On October 6, 1979, the State of Nevada filed a complaint charging Ybarra with first-degree murder, first-degree kidnapping, battery with intent to commit sexual assault, and sexual assault. 1 AA 1-3. The jury found Ybarra guilty of all four counts. 6 AA 1292. The jury also found four aggravating circumstances: the murder was committed by a defendant who was previously convicted of a felony involving the use or

threat of violence to the person of another; the murder was committed while the defendant was engaged in the commission of forcible rape (sexual assault); the murder was committed while the defendant was engaged in the commission of kidnapping in the first degree; the murder involved torture, depravity of mind or the mutilation of the victim. 6 AA 1293-95. The jury sentenced Ybarra to death, without being instructed that it needed to find beyond a reasonable doubt that the mitigating circumstances are not outweighed by the aggravating circumstances.

Litigation challenging Ybarra's conviction and sentence followed.[1] Two arguments for relief, previously rejected by this Court, are relevant here.

First, on direct appeal, Ybarra argued that the aggravating circumstance under NRS 200.033(8) was unconstitutionally vague. 6-7 AA 1463-1505. This Court denied relief on this claim: "we hold that the phrase 'depravity of mind,' contained in the death penalty statute . . . is not impermissibly vague when, as in this case, the court meticulously defined it for the jury." Ybarra v. State, 100 Nev. 167, 177, 679 P.2d 797,

[1] A thorough recitation of the procedural history of this case can be found in the petition. See 7 AA 1620-44.

803 (1984) (relying on Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 412-13 (1979)).

Second, Ybarra filed a post-conviction petition on March 6, 2003, before the Seventh Judicial District Court. That petition raised a claim that "The jury was not instructed that it had to find that aggravation was not outweighed by mitigation beyond a reasonable doubt . . . ." 7 AA 1520. The district court denied this claim, finding it procedurally defaulted. See 7 AA 1595-1608. This Court later affirmed this ruling. 7 AA 1615.

On January 11, 2017, Ybarra filed the instant petition, raising two claims: (1) Ybarra's constitutional rights were violated by the failure to instruct the jury that it needed to find beyond a reasonable doubt that the mitigating circumstances are not outweighed by the aggravating circumstances and (2) the depravity of mind aggravating circumstance under former NRS 200.033(8) violated Ybarra's constitutional rights.[2]

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[2] In the federal district court, Ybarra contemporaneously filed a Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, raising the same issues. See Ybarra v. Filson, No. 3:00-cv-00233-GMN-VPC, ECF No. 271 (D. Nev. Jan. 10, 2017). This motion was denied, and this denial was then affirmed on appeal. See Ybarra v. Filson, 869 F.3d 1016 (9th Cir. 2017).

Ybarra's federal proceedings, however, remain ongoing: the Ninth Circuit remanded Ybarra's case for the federal district court to consider Ybarra's claim that he suffers from intellectual disability. See id. at 1033.

Without waiting for the State to respond, the district court denied relief, finding that the claims are procedurally defaulted. 7 AA 1655.

V. SUMMARY OF ARGUMENT

The Supreme Court of the United States in Hurst v. Florida, 136 S. Ct. 616 (2016), established a new rule of constitutional law that renders Ybarra's death sentence unconstitutional because (1) the trial court did not instruct the jury that it had to find the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt and (2) because, after striking the invalid depravity of mind aggravating circumstance, this Court cannot reweigh the remaining aggravating circumstances and the mitigating circumstances. Hurst applies retroactively on collateral review. And Hurst provides good cause to excuse any applicable procedural default. Consequently, the district court erred in concluding that the petition was procedurally defaulted and denying relief. This Court should therefore remand Mr. Ybarra's case for a new sentencing proceeding, in which both the jury does not consider the unconstitutional depravity of mind aggravating circumstance and the jury is instructed that it can impose

death only after finding beyond a reasonable doubt that aggravating circumstances are not outweighed by the mitigating evidence.

VI. ARGUMENT

A. Ybarra's Hurst Claim Is Meritorious

Nevada law provides that a criminal defendant cannot be sentenced to death unless a jury finds both that at least one aggravating factor exists and that the mitigating evidence does not outweigh the aggravating factor or factors. See 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."); Middleton v. State, 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."); 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) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

During Ybarra's penalty phase, the trial court instructed the jury that the State had to prove the existence of each aggravating factor beyond a reasonable doubt. 6 AA 1430. The trial court failed, however, to instruct the jury that the State additionally had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. See 6 AA 1424-60. As set forth below, under the new rule established in Hurst, Ybarra's constitutional rights were violated by the jury's outweighing determination.

1. A long line of cases from the Supreme Court of the United States, culminating in Hurst v. Florida, 136 S. Ct. 616 (2016), has established that any fact increasing a defendant's statutory-maximum sentence must be proved to the jury by the State beyond a reasonable doubt

Hurst is the latest of a long line of cases from the Supreme Court of the United States, which have expanded the types of findings that must

be found by a jury beyond a reasonable doubt. First, in In re Winship, the Supreme Court held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970). Proof beyond a reasonable doubt is necessary, the court reasoned, in order to ensure accuracy in criminal judgments. Id. at 361–64. The Court has since recognized an associated Sixth Amendment right to have a jury, not a judge, decide whether the State has met this burden. See Jones v. United States, 526 U.S. 227, 251–52 (1999); Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993).

After Winship, the Supreme Court several times has expanded the definition of an "element" subject to proof beyond a reasonable doubt and the associated right to a jury trial. The Court in Winship originally defined the elements of a criminal offense as "every fact necessary to constitute the crime" under state law. 397 U.S. at 364. Over the next few decades, the Court began also to treat facts affecting a defendant's maximum sentence for a crime as "elements" that have to be submitted to a jury and proven beyond a reasonable doubt. See McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (recognizing that "in certain limited

circumstances Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged"); Mullaney v. Wilbur, 421 U.S. 684, 698–99 (1975) (rejecting state's "formalis[tic]" argument and concluding that Winship cannot be "limited to those facts that constitute a crime as defined by state law").

The Supreme Court clarified this expansion of Winship in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Court considered the constitutionality of a New Jersey statute that allowed a judge to increase a sentence above the statutory maximum after finding by a preponderance of the evidence that the defendant committed the crime with a biased purpose. Id. at 468–69. The Court concluded that, because the finding of a biased purpose increased the penalty beyond the statutory maximum, it was "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Id. at 494 n.19. As a result, the Court reasoned, it needed to be "submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The Court further noted that it was immaterial whether the state referred to the finding as an "element" or a "sentencing factor": "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the

defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 494.

Two years later, in Ring v. Arizona, the Supreme Court applied these principles to Arizona's capital-sentencing scheme, which allowed a sentence of death if a judge, not a jury, found the existence of at least one aggravating factor. 536 U.S. 584, 592 (2002). Without the finding of an aggravating factor, the maximum punishment under Arizona law for first-degree murder was life imprisonment. Id. at 597. Relying on Apprendi, the Court concluded that the existence of an aggravating factor in Arizona, because it increased the "punishment beyond the maximum authorized by a guilty verdict standing alone," was the "'functional equivalent of an element of a greater offense.'" Id. at 605, 609 (quoting Apprendi, 530 U.S. at 494 n.19). Hence, the Court held that the existence of an aggravating factor had to be found by a jury, not a judge, under the Sixth Amendment. Id. at 609.

Finally, in Hurst, the Supreme Court concluded that any finding required in the eligibility phase is an element and thus must be submitted to the jury. See Hurst, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to

impose a sentence of death."); see also id. at 622 ("Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty."). In Florida, like in Nevada, this included two findings: "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 622 (alterations in original) (quoting former Fla. Stat. § 921.141(3)). But both these findings ultimately were made by a judge, with only a nonbinding recommendation from the jury. Id. So, in Florida, the statutory maximum penalty authorized by a jury's verdict alone was life imprisonment. Id. The Supreme Court held that this scheme violated the Sixth Amendment. Id. at 619. Because the eligibility determination "'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict,'" the Court concluded that it is an "element" that, under the Sixth Amendment, "must be submitted to the jury." Id. at 621–22 (alteration in original) (quoting Apprendi, 530 U.S. at 494).

2. Hurst establishes that the "outweighing" determination under Nevada law must be proved to the jury by the State beyond a reasonable doubt

The United States Supreme Court has instructed that capital sentencing hearings must proceed in two phases. First, during the eligibility phase, a factfinder must determine whether an individual is eligible for the death penalty, based on requirements designed to "limit the class of murderers to which the death penalty may be applied." Brown v. Sanders, 546 U.S. 212, 216 (2006); see Rauf v. State, 145 A.3d 430, 452–53 (Del. 2016) (Strine, C.J., concurring). Second, the factfinder must "determine whether a defendant thus found eligible for the death penalty should in fact receive it." Brown, 546 U.S. at 216; see Buchanan v. Angelone, 522 U.S. 269, 275 (1998); Rauf, 145 A.3d at 453–54 (Strine, C.J., concurring).

In Nevada, the legislature has attempted to comply with this mandate by requiring the jury to make three separate determinations. First, the jury is required to find the existence of "at least one aggravating circumstance," and further determine whether any "mitigating circumstances [are] sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). Only if both

requirements are met is a defendant "eligible" for the death penalty. See id.; see also NRS 200.030(4)(a) (allowing death penalty "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"); Hollaway, 116 Nev. at 745, 6 P.3d at 996 ("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."); Middleton, 114 Nev. at 1116–17, 968 P.2d at 314–15 ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."). After a jury finds a defendant death eligible, it "must then decide on a sentence unanimously and still has discretion to impose a sentence less than death." Hollaway, 116 Nev. at 746, 6 P.3d at 996; see Bennett v. State, 111 Nev. 1099, 1109–10, 901 P.2d 676, 683 (1995).

Although this Court has repeatedly held that the weighing determination is part of the eligibility phase in Nevada, this Court also has concluded that the weighing determination is not subject to proof beyond a reasonable doubt. See Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 250–51 (2011); McConnell v. State, 125 Nev. 243, 253–54, 212 P.3d 307, 314–15 (2009), as corrected (July 24, 2009). Hurst makes clear that these positions are in conflict: Every finding needed to render a defendant "eligible for the death penalty," Hurst, 136 S. Ct. at 622 (emphasis added), increases the statutory maximum that a defendant faces and therefore is an "element" that must be proven beyond a reasonable doubt, see Apprendi, 530 U.S. at 490. Because under Nevada law the outweighing determination is part of the eligibility phase, it is an "element" as defined by Hurst and Apprendi. To the extent that Nunnery and McConnell allow the outweighing finding to be made on a standard of proof less strict than beyond a reasonable doubt, the holdings do not survive Hurst. Compare Hurst, 136 S. Ct. at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"), and Apprendi, 530 U.S. at 490 ("[A]ny fact that increases the penalty for

a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."), with Nunnery, 127 Nev. at 772, 263 P.3d at 250 (concluding "that even if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof"). The district court, thus, was wrong to rely on Nunnery to deny Ybarra's claim. 7 AA 1649-50. This is a case of first impression for this Court; to the extent this Court has rendered opinions that are inconsistent with Ring and Hurst, this Court is bound by the decisions of the United States Supreme Court. See U.S. Const. Article VI, Clause 2 (Supremacy Clause).

Ybarra's jury was instructed that it could impose a death sentence "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." 6 AA 1429. The jury was further instruction that the "burden rests upon the prosecution to establish any aggravating circumstance or circumstances beyond a reasonable doubt." 6 AA 1430. The trial court did not instruct the jury, however, that it could impose a death sentence only if it

concluded that the State had proven beyond a reasonable doubt that the mitigating circumstances were not outweighed by the aggravating circumstances. This is a structural error. See Sullivan, 508 U.S. at 280–82 (concluding that trial court's failure to properly instruct jury regarding prosecution's burden of proof was a structural error that required reversal). As a result, Ybarra's sentence must be vacated.

a. The district court erred in ruling otherwise

The district court reasoned that Hurst did not aide Ybarra because "the only issue addressed by Hurst was whether Florida's death penalty law which allowed for an advisory verdict of death by a jury, but required a judge to make findings in order to impose the death penalty was constitutional in light of Apprendi and Ring." 7 AA 1649-50. This was error because Hurst concerns both the identity of the factfinder and the standard of proof.

The district court also rejected Ybarra's reliance on Hurst because Hurst did not address the "appropriateness of the weighing instruction." 7 AA 1649. This was error.

Finally, the district court further reasoned that this Court has rejected the "beyond a reasonable doubt standard" for outweighing. See

7 AA 1650 (citing Nunnery, 127 Nev. 749, 263 P.3d 235, and Middleton v. McDaniel, No. 62869, 2017 WL 7407431 (Nev. Dec. 21, 2016)). This, too, was error.

These three errors are addressed in turn.

(1) Hurst concerns both the identity of the factfinder and the standard of proof

The district court read Hurst as applying only to the identity of the factfinder. 7 AA 1649-50. It is true that the Court in Hurst was faced only with whether a jury must make death-eligibility findings. 136 S. Ct. at 619 (concluding that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death"). But this is immaterial. As the United States Supreme Court has explained:

> It is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278. And, although the Court in Hurst did not directly address the standard of proof in the context of that case, it did note that the Sixth Amendment right to a jury trial, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." Hurst, 136 S. Ct. at 621.

The cases relied on by the Court in Hurst further reinforce the intertwined nature of the two rights. See Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013) ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt."); Ring, 536 U.S. at 600 ("'[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt.'" (quoting Jones, 526 U.S. at 243 n.6)); Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt."); see also Southern Union Co. v. United States, 567 U.S. 343, 348–49 (2012); Blakely v. Washington, 542 U.S. 296, 301–02 (2004). Once the High Court determined that the eligibility determination was an "element," there could be no conclusion except that it needed to be found by a jury beyond a reasonable doubt.

(2) Hurst applies both to the finding of aggravating circumstances and the outweighing determination

The district court reasoned that Hurst did not apply here because Hurst did not address "the appropriateness of a weighing instruction." 7 AA 1649. But the plain language of Hurst belies this argument. In its decision, the Supreme Court did not differentiate between the two distinct findings—the existence of at least one aggravating factor and the outweighing determination—underlying the eligibility determination. Instead, the Court made clear that both findings, because they were both necessary to make a defendant eligible for the death penalty, were elements that needed to be found by the jury. See Hurst, 136 S. Ct. at 622 (criticizing Florida statute for requiring judge to make finding "'[t]hat sufficient aggravating circumstances exist'" and "'[t]hat there are insufficient mitigating circumstances to outweigh the aggravating

circumstances'" (alterations in original) (quoting former Fla. Sta. § 921.141(3)); see also id. (explaining that Florida's death penalty scheme was unconstitutional because it did "not require the jury to make the critical findings necessary to impose the death penalty" and instead required "a judge to find these facts" (emphasis added)); id. at 621 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (emphasis added)).

Moreover, the State of Florida had contended that the weighing process did not fall within the ambit of Ring and Apprendi because the jury could not recommend death unless it implicitly found at least one aggravating factor. Id. at 622; see State v. Steele, 921 So.2d 538, 545 (Fla. 2005) (describing Florida capital sentencing procedures), as revised on denial of reh'g (Feb. 2, 2006), and abrogated by Hurst, 136 S. Ct. at 622. The Court explicitly rejected that argument, emphasizing the "central and singular role the judge plays under Florida law," but also noting that determinations regarding the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances were factual findings necessary to Hurst's eligibility for a death sentence.

Hurst, 136. S. Ct. at 622. As a result, the Sixth Amendment applied with equal force to those determinations. Id.

In addition to comporting with the plain language in Hurst, reading the case as applying to both the finding of aggravating factors and the outweighing determination comports with the decisions of at least two state supreme courts, including the Supreme Court of Florida on remand from Hurst. In Hurst v. State, the Supreme Court of Florida interpreted the United States Supreme Court's decision as "requir[ing] that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously be the jury." 202 So.3d 40, 44 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). These findings include, the court held, "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." Id.

The Delaware Supreme Court has also found its state's death penalty statute, which assigned to the judge the task of weighing aggravating and mitigating circumstances, unconstitutional. Rauf, 145 A.3d at 433–34. And other states have agreed that the outweighing

determination must be found by a jury. See State v. Whitfield, 107 S.W.3d 253, 256–62 (Mo. 2003) (holding that the rule of Ring applied to all factual prerequisites for a death sentence, including (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation); Woldt v. People, 64 P.3d 256, 266–67 (Colo. 2003) (concluding that Sixth Amendment protections extend to all factual findings on which death sentence is predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved" (citations and internal quotation marks omitted)).

Finally, Justice Sotomayor, three years before authoring the decision in Hurst, in a dissent from the denial of certiorari, criticized Alabama's capital sentencing scheme on similar grounds:

> The very principles that animated our decisions in Apprendi and Ring call into doubt the validity of Alabama's capital sentencing scheme . . . . [A] defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. The statutorily required

> finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under Apprendi and Ring, a finding that has such an effect must be made by a jury.

Woodward v. Alabama, 134 S. Ct. 405, 410–11 (2013) (Sotomayor, J., dissenting from the denial of certiorari) (internal citations omitted).

In light of this history, it is abundantly clear that Ring and Hurst cannot be selectively read in the narrowest way possible as the district court concluded below. Ring required that capital defendants receive "a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Hurst emphasized that this rule encompasses all facts necessary to a sentence of death, including the outweighing determination. 136 S. Ct. at 619. Because Nevada's statutes provide that a death sentence is contingent upon factual findings that aggravating circumstances outweigh or equal mitigating circumstances, those findings also fall under Ring's and Hurst's umbrella. Id. at 622.

(3) The outweighing determination, regardless whether it's classified as factual, needs to be proven by the State beyond a reasonable doubt

Finally, the district court held that the outweighing determination does not need to be proven beyond a reasonable doubt because it is not a "factual determination." 7 AA 1650 (citing Nunnery, 127 Nev. 749, 263 P.3d 235, and Middleton, 2017 WL 7407431). A few recent cases from this Court have concluded that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" and have "disavow[ed] any prior language suggesting otherwise." Nunnery, 127 Nev. at 775–76, 263 P.3d at 253; see Burnside v. State, 131 Nev. ___, 352 P.3d 627, 651 (2015), reh'g denied (Oct. 22, 2015), cert. denied, 136 S. Ct. 1466 (2016).

But these decisions conflict both with the statutory language and Hurst, which clearly characterize the outweighing determination as a factual finding. The legislature has mandated that a defendant can be sentenced to death only if the jury "finds at least one aggravating circumstances and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). And, in Hurst, the United States

Supreme Court concluded that both components of Florida's capital sentencing scheme—the finding of aggravating factors and the outweighing determination—were facts that needed to be found by a jury. See Hurst, 136 S. Ct. at 622 ("Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." (emphases added)); see also Whitfield, 107 S.W.3d at 259–61 (characterizing weighing determination as factual); Woldt, 64 P.3d at 264–67 (same).[3]

This Court's conclusion in Nunnery that the outweighing determination is not factual also is irreconcilable with this Court's practice of "reweighing" aggravating and mitigating factors on appeal after an aggravating factor used to sentence a defendant to death later is determined to be invalid. See Canape v. State, 109 Nev. 864, 877–83, 859 P.2d 1023, 1031–35 (1993). As the petitioner argued in Nunnery, "if

[3] In a different context, the United States Supreme Court rejected a similarly restrictive interpretation of what could constitute "findings of fact," concluding that it was "not apparent that the term 'factual findings' should be read to mean simply 'facts' (as opposed to 'opinions' or 'conclusions')." Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163–64 (1988).

weighing involves a moral judgment rather than fact-finding, it is not possible for this Court to say with any kind of certainty that a juror would have reached the same conclusion in the absence of an invalid aggravating circumstance." 127 Nev. at 776 n.13 (internal quotation marks omitted).

Cases concluding that outweighing determinations in other states are not factual findings can be distinguished, as those states require the outweighing determination as part of the selection phase, not the eligibility phase. See State v. Fry, 126 P.3d 516, 534 (N.M. 2005) ("The 'fact' that makes a defendant eligible for the death penalty is the aggravating circumstance, combined with a guilty verdict on the crime of first degree murder."); Ritchie v. State, 809 N.E.2d 258, 265 (Ind. 2004) (explaining that Indiana law "authorizes the death penalty" if one or more aggravating factors is found); Oken v. State, 835 A.2d 1105, 1125 (Md. 2003) ("[I]t is the finding of an aggravating factor which makes a defendant death-eligible, not that mitigating facts are weighed and found insufficient to justify mercy."); Ex parte Waldrop, 859 So.2d 1181, 1188 (Ala. 2002) ("Only one aggravating circumstance must exist in order to impose a sentence of death."). As a result, intangible, nonfactual

considerations like "mercy" may be included as part of the outweighing determination. See Oken, 835 A.2d at 1122–23; Waldrop, 859 So. 2d at 1188–90.

Under Nevada law, on the other hand, there is "a relatively unique aspect . . . that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances." Lisle v. State, 131 Nev. Adv. Op. 39, 351 P.3d 725, 732 (2015); see Servin, 117 Nev. at 786, 32 P.3d at 1285; Hollaway, 116 Nev. at 745, 6 P.3d at 996; Middleton, 114 Nev. at 1116–17, 968 P.2d at 314–15. After a jury determines that a defendant is death eligible, it then can consider other evidence and has the discretion to impose a sentence less than death, despite the eligibility of the defendant for the death penalty. See NRS 175.554(2)(c); Hollaway, 116 Nev. at 746, 6 P.3d at 996; Bennett, 111 Nev. at 1109–10, 901 P.2d at 683.

For similar reasons, the United States Supreme Court's decision in Kansas v. Carr, 136 S. Ct. 633 (2016), does not apply to this Court's decision in this case. In Carr, the Court considered an Eighth Amendment challenge to a jury instruction that failed to inform jurors

that mitigating circumstances did not need to be proven beyond a reasonable doubt. Id. at 642–44. The Court was not asked to address the Sixth Amendment or due process consequences of the weighing of aggravating and mitigating circumstances. Nevertheless, the Court in dicta expressed skepticism that the weighing determination is susceptible to a standard of proof. Id. at 642. But, as the Court pointed out, the weighing determination in Kansas is part of the selection phase, not the eligibility phase, of a capital sentencing hearing, and at least one of the possible mitigating circumstances is "'mercy,' which simply is not a factual determination." Id. at 642–43; see Kansas v. Marsh, 548 U.S. 163, 175–77 (2006). The intangible factors cited in Carr that comprise the moral judgment as to the appropriate sentence—and that make weighing less of a factual determination—are not considerations during a Nevada jury's weighing determination. Those factors are only considered once death eligibility is established. Moreover, the Court's statements in dicta were unnecessary to the determination of the case and are not binding on this Court. See Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 281–82, 21 P.3d 16, 21–22 (2001). And the Court's question whether "it is even possible to apply a standard of proof to the mitigating-factor

determination," Carr, 136 S. Ct. at 642, actually is answered by the very statute the Court analyzed, which provides "that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt," id. at 643; see Marsh, 548 U.S. at 178–79 ("[T]he State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment.").[4]

[4] Other states, too, have answered this question. See, e.g., Ark. Code Ann. § 5-4-603(a)(2) (requiring jury, before imposing a sentence of death, to find that "[a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist"); Ohio Rev. Code Ann. § 2929.03(D)(1) ("The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."); Tenn. Code Ann. § 39-13-204(g)(1)(B) (requiring state to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating evidence); Utah Code Ann. § 76-3-207(5)(b) ("The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."); Rauf, 145 A.3d at 434 (concluding that Sixth Amendment requires jury to find that aggravating circumstances outweigh mitigating circumstances "beyond a reasonable doubt"); State v. Rizzo, 833 A.2d 363, 410 (Conn. 2003)

In any event, it ultimately is immaterial whether the outweighing determination is labeled factual because, as part of the eligibility phase, it increases the maximum penalty that a defendant is subject to. And this, not the distinction between factual and nonfactual matters, is the common thread underlying Hurst, Ring, and Apprendi. "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 483; see Hurst, 136 S. Ct. at 622 (emphasizing that a defendant cannot be sentenced above the maximum possible with the jury verdict alone); Ring, 536 U.S. at 588–89 (same). And, although the United States Supreme Court has discussed sentencing discretion when a sentencer is deciding on a sentence within the statutory parameters, see Cunningham v. California, 549 U.S. 270, 294 (2007), it has never conflated this discretion with the requirement that a jury find the factors setting those statutory parameters beyond a

("[T]he jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in the case.").

reasonable doubt. Cf. Ring, 536 U.S. at 605 ("[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").

B. The depravity of mind aggravating circumstance is unconstitutional

The jury in this case was instructed that one of the aggravating circumstances is "where the murder involved torture, depravity of mind, or the mutilation of the victim." 6 AA 1440. The instructions further explained:

> The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such an act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.
>
> The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased, nor does it necessarily require any proof that the deceased suffered pain.

6 AA 1441. The instructions also described depravity of mind:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of

> regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

6 AA 1442. Finally, the mutilation instruction, explained "the term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect." 6 AA 1443.

These instructions are unconstitutional. See Ybarra v. McDaniel, 656 F.3d 984, 994-95 (9th Cir. 2011); compare Godfrey v. Georgia, 446 U.S. 420, 428 (1980), with 6 AA 1442; see also Jimenez v. State, 106 Nev. 769, 774, 801 P.2d 1366, 1369 (1990) ("We have held that the aggravating circumstance specified at NRS 200.033(8) requires 'torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind.'" (quoting Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990)).[5]

[5] Here, the Ninth Circuit's finding of harmlessness is not binding on this Court because the Ninth Circuit applied the more onerous federal standard for harmlessness that applies in federal habeas cases. Ybarra, 656 F.3d at 995.

In rejecting this claim on direct appeal, this Court relied on Deutscher v. State, 95 Nev. 669, 601 P.2d 407, 412-13 (1979). However, the Ninth Circuit subsequently found, consistent with this Court's later jurisprudence, that the depravity of mind aggravating circumstance was unconstitutional in Deutcher too. See Deutscher v. Whitley, 946 F.2d 1443, 1446-47 (9th Cir. 1991), vacated on other grounds 506 U.S. 935 (1992).

This aggravating circumstance cannot be saved on the basis of torture or mutilation because no narrowing instruction was provided to the jury. See Jimenez, 106 Nev. at 774, 801 P.2d at 1369. Moreover, the verdict form only allowed the jury to reach a general verdict as to depravity of mind, torture, or mutilation. See 6 AA 1461. Thus, under Stromberg v. California, 283 U.S. 359, 368 (1931) and Yates v. United States, 354 U.S. 298, 312 (1957), the verdict as to this aggravating circumstance must be set aside because the jury could have relied on the invalid depravity of mind aggravating circumstance.

In Valerio v. Crawford, 306 F.3d 742, 756 (9th Cir. 2002) (en banc), the Ninth Circuit, summarizing Supreme Court law, explained that when an aggravating circumstance is unconstitutional, an appellate court has

three options: (1) the court can apply a harmless error analysis under Chapman v. California, 386 U.S. 18 (1967); (2) if the factfinder was a judge, then the appellate court can apply a narrowing construction and then conduct a de novo evaluation of the penalty phase evidence; or (3) the appellate court can conduct a re-weighing analysis. Valerio, 306 F.3d at 756-57. The second option is not available here because a jury served as factfinder during the trial. Neither a harmless error analysis under Chapman nor a reweighing analysis allow this Court to uphold Ybarra's death sentence.

1. This Court may not conduct a harmless error analysis under Chapman to uphold Ybarra's death sentence

"Under Chapman, [this Court] can affirm if it finds beyond a reasonable doubt that the same result would have been obtained without relying on the unconstitutional aggravating circumstance." Valerio, 306 F.3d at 756 (citing Clemons v. Mississippi, 494 U.S. 738, 752-53 (1990)). Nonetheless, this Court should not apply harmless error analysis to a vague aggravating circumstance because of the intensively subjective structure of the Nevada sentencing scheme. Under Nevada law, jurors have complete discretion to not impose the death penalty, regardless of

the number or weight of aggravating circumstances. The discretion inherent in Nevada's death penalty scheme renders ineffective any kind of harmless error analysis.[6]

Assuming this Court applies a harmless error analysis, this Court cannot conclude that the error was harmless beyond a reasonable doubt. The vagueness of this aggravating circumstance invited the jury to impose the death penalty in its unfettered discretion. Nor did the State's argument limit how this aggravating circumstance could be applied. See 6 AA 1356-57. Indeed, the State itself invited the jury to impose the death penalty by invoking the idea of, "I know it when I see it." 6 AA 1361 ("we believe that the evidence will help you decide that you will know it when you see it. This is that case. What is known as the death penalty is appropriate."). This kind of standardless approach to the death penalty is precisely what Gregg v. Georgia, 428 U.S. 153 (1976) prohibited in reinstating the death penalty. See Id. at 189 (opinion of Steward, Powell,

[6] Indeed, Nevada juries have declined to impose the death penalty even in cases with highly aggravated murders. See Duckworth v. State, 113 Nev. 780, 942 P.2d 157 (1997) (jury verdicts of life without possibility of parole for two defendants, based on two murders with total of thirteen aggravating circumstances, including robbery, sexual assault, and torture or mutilation).

Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). Thus, this Court cannot find this error harmless.

2. Hurst establishes that the practice of "reweighing" aggravating and mitigating circumstances violates the Sixth Amendment and Due Process Clause of the Fourteenth Amendment

It is axiomatic that "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." Sochor v. Florida, 504 U.S. 527, 532 (1992). In Clemons v. Mississippi, however, the Supreme Court concluded that courts in states that require the fact-finder to weigh aggravating circumstances against mitigating evidence could nevertheless affirm a death sentence founded, in part, on an invalid aggravating circumstance if the court concluded that the death sentence was factually supported. 494 U.S. 738, 741, 745 (1990). This approach, however, is no longer viable after Hurst.

The Court's approval of appellate reweighing in Clemons was founded in its pre-Apprendi Sixth Amendment jurisprudence, which permitted judicial factfinding in capital sentencing. At the time the Court decided the case, "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence [had] been soundly rejected by prior decisions of [the] Court." Clemons, 494 U.S. at 745. As the Court further explained, nothing in Sixth Amendment law, as it existed in 1990, "require[d] that a jury specify the aggravating factors that permit the imposition of capital punishment" or "require[d] jury sentencing, even where the sentence turns on specific findings of fact." Id. at 745–46.

As this language makes clear, appellate reweighing was deemed permissible only because the 1990 Court generally approved of judicial factfinding in capital sentencing. This conclusion, substantially undermined in Ring, was eviscerated by Hurst, which held impermissible any judicial factfinding—including judicial determinations about the relative weight of aggravating and mitigating circumstances—that increases a potential sentence above what the jury verdict authorizes. See Hurst, 136 S. Ct. at 621–22; see also State v. Kirkland, 15 N.E.3d

818, 850–51 (Ohio 2014) (O'Neill, J., dissenting) (opining "that Clemons is bad law that will someday be explicitly overruled"); Baston v. Bagley, 420 F.3d 632, 639 n.1 (6th Cir. 2005) (Merritt, J., dissenting) ("[I]t seems very likely that Ring has overruled Clemons."). Just as it violates the Sixth Amendment for a judge to independently weigh aggravating and mitigating circumstances in the first instance, it also is a clear violation of the Sixth Amendment for an appellate court to independently reweigh aggravating and mitigating circumstances and, based on its own conclusions about these facts, affirm a sentence of death. Moreover, because the Sixth Amendment right to a jury trial incorporates the Due Process right to have that jury make findings beyond a reasonable doubt, see Sullivan, 508 U.S. at 278, an appellate court's failure to apply the reasonable-doubt standard when reweighing effectively repeats the error committed by the district court. Thus, this Court may not reweigh the aggravating circumstances against the mitigating circumstances and uphold Ybarra's death sentence.

C. The Rule Announced in Hurst Applies Retroactively on Collateral Review

A new rule of constitutional law applies retroactively in Nevada if either of two exceptions is met: "(1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); see Clem v. State, 119 Nev. 615, 628, 81 P.3d 521, 530–31 (2003). This standard is more relaxed than the one applied in federal courts, which apply new rules of constitutional significance retroactively only if they are substantive rules or "watershed" procedural rules, Teague v. Lane, 489 U.S. 288 (1989). See Colwell, 118 Nev. at 819, 59 P.3d at 471 (describing federal framework as "strict[]" and "severe[]," and adopting more-relaxed retroactivity approach); Clem, 119 Nev. at 628, 81 P.3d at 530 ("In Cowell v. State, we adopted for Nevada a modified Teague approach, which more strictly construes the meaning of 'a new rule' and more liberally defines the two exceptions to the usual rule of nonretroactivity."); see also Danforth v.

Minnesota, 552 U.S. 264, 266 (2008) (concluding that Teague does not "constrain[] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion").

1. The United States Supreme Court in Hurst announced a new rule of constitutional law

The rule announced in Hurst is new and based on constitutional law—the Sixth Amendment and, by extension, the Due Process Clause of the Fourteenth Amendment. After Hurst, a determination that mitigating circumstances do not outweigh aggravating circumstances, when required by a state during the eligibility stage of a capital sentencing proceeding, is an "element" of the offense of conviction that must be submitted to a jury (and found beyond a reasonable doubt). And, although the United States Supreme Court in Hurst relied heavily on Ring, this Court has explained that a rule is new even if it "applied prior case law . . . to closely analogous facts," so long as it deals with "conflicting prior authority and expressly overruled precedent in announcing its rule." Colwell, 118 Nev. at 821, 59 P.3d at 473; Bejarano, 122 Nev. at 1075, 146 P.3d at 271 ("[A] rule is new when it overrules precedent, disapproves a practice sanctioned by prior cases, or overturns a

longstanding practice uniformly approved by lower courts."); Ennis v. State, 122 Nev. 694, 703, 137 P.3d 1095, 1101 (2006) ("Because the Crawford decision clearly overruled the precedent in Roberts, it set forth a new rule under Nevada law."). Just as the United States Supreme Court in Ring overruled precedent upholding Arizona's capital sentencing scheme, 536 U.S. at 608–09, the Court in Hurst overruled precedent upholding Florida's capital sentencing scheme, Hurst, 136 S. Ct. at 623–24. The rule therefore is "new"; it applies retroactively, however, because both of the exceptions recognized in Colwell apply.

2. The rule announced in Hurst applies retroactively in Nevada because it increases the accuracy of capital sentences

The rule announced in Hurst must be retroactively applied because "it establishes a procedure without which the likelihood of an accurate [verdict] is seriously diminished." Colwell, 118 Nev. at 820, 59 P.3d at 472; see Powell v. State, 153 A.3d 69, 75–76 (Del. 2016) (concluding that rule announced in Hurst is "a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware" because it increases accuracy). The United States Supreme Court, along with this Court and lower federal courts, has long recognized that the beyond-a-

reasonable-doubt standard of proof "is a prime instrument for reducing the risk of convictions resting on factual error." Winship, 397 U.S. at 363; see Batin v. State, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) ("Our insistence that the State prove every element of a charged offense beyond a reasonable doubt serves an imperative function in our criminal justice system: to give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." (citation and internal quotation marks omitted)); United States v. Doyle, 130 F.3d 523, 538–39 (2d Cir. 1997) ("As the Supreme Court noted in Winship, the reasonable doubt standard is vital in part because it ensures against unjust convictions and reduces the risk of factual error."); United States v. Gabriner, 571 F.2d 48, 50 (1st Cir. 1978) (explaining that reasonable-doubt standard "exists to reduce the risk of convicting defendants by factual error").

In fact, in two cases the United States Supreme Court has already held that rules requiring the reasonable-doubt standard are applied retroactively. See Powell, 153 A.3d at 75 ("The question of whether the new higher burden of proof standard recognized in Rauf is retroactive was decided by the United States Supreme Court more than forty years

ago."). In Ivan V. v. City of New York, the Court held that the new rule announced in Winship, 397 U.S. 358, mandating a beyond-a-reasonable-doubt standard, must be applied retroactively. 407 U.S. 203, 205 (1972) And in Hankerson v. North Carolina, the Court held that the rule announced in Mullaney v. Wilbur, 421 U.S. 684 (1975), similarly applied retroactively. 432 U.S. 233, 240–44 (1977). The Court's holdings in both cases were premised on the principle that Winship's beyond-a-reasonable-doubt standard was designed to uphold the truth-finding function of criminal trials and to diminish the probability that an innocent person would be convicted. See Hankerson, 432 U.S. at 241–44; Ivan V., 407 U.S. at 204–05. Although these cases predate Teague, they have never been overruled and are based on a consideration—accuracy of verdicts—that is indistinguishable from Nevada's Colwell standard. Compare Williams v. United States, 401 U.S. 646, 653 (1971) ("Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."), with Colwell, 118 Nev. at 820, 59 P.3d at 472 (explaining that rule is to

be applied retroactively "if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished.").

It is this accuracy-increasing function that distinguishes Ybarra's situation from that discussed in Schriro. In Schriro, the United States Supreme Court concluded that the rule announced in Ring was procedural and did not apply retroactively. 542 U.S. at 353–58. But the Court addressed only the retroactivity of Ring's holding that a jury, not a judge, must find the existence of an aggravating circumstance. Id. at 353. "Rules that allocate decisionmaking authority," the Court reasoned, "are prototypical procedural rules." Id. And because there is no evidence that juries make more accurate factfinders than judges, the Court concluded that the rule in Ring is not of "watershed" significance. Id. at 355–58; see DeStefano v. Woods, 392 U.S. 631, 633–35 (1968) (refusing to give retroactive effect to rule requiring jury trials).

Ybarra's constitutional claim, on the other hand, concerns not the identity of the factfinder, but the standard of proof that the factfinder must apply when determining death-eligibility in Nevada. While the identity of the factfinder may not affect the accuracy of capital sentencing proceedings, the application of a beyond-a-reasonable-doubt standard of

proof is central to the truth-finding function of criminal trials. See Winship, 397 U.S. at 363–64; Batin, 118 Nev. at 65, 38 P.3d at 883. Consequently, the implicit standard-of-proof aspect of Hurst merits retroactive application. See Powell, 153 A.3d at 73–76 (holding Hurst retroactive and distinguishing Schriro as addressing only the misallocation of fact-finding responsibility (judge versus jury) and not the applicable burden of proof).

Moreover, the decision in Schriro—along with decisions from the United States Courts of Appeals rejecting retroactivity arguments for Apprendi and Alleyne—was based on the federal retroactivity standards, which allow retroactive application of procedural rules only if they are of watershed significance. Schriro, 542 U.S. at 355–58; see United States v. Sanders, 247 F.3d 139, 149–51 (4th Cir. 2001) (accepting that rule announced in Apprendi could improve accuracy but nevertheless concluding that it was not a "watershed" principle); United States v. Sanchez-Cervantes, 282 F.3d 664, 668–671 (9th Cir. 2002), as amended (Mar. 15, 2002) (concluding that rule announced in Apprendi was not "a bedrock procedural element"). But this Court has rejected that "strict[]" and "severe[]" restriction, opting instead to apply procedural rules

retroactively so long as they increase "the likelihood of an accurate conviction." Colwell, 118 Nev. at 819–20, 59 P.3d at 471–72; see Clem, 119 Nev. at 628, 81 P.3d at 530–31.

3. The rule announced in Hurst applies retroactively because it is substantive

Substantive rules, which "establish that it is unconstitutional to . . . impose a type of punishment on certain defendants because of their status or offense," Colwell, 118 Nev. at 821, 59 P.3d at 472, also apply retroactively in Nevada. The rule announced in Hurst is substantive because it excludes a class of defendants from the Nevada death penalty on Sixth Amendment and due process grounds—that is, defendants whose aggravating circumstances do not outweigh their mitigating evidence beyond a reasonable doubt. See Schriro, 542 U.S. at 353 ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."); Montgomery v. Louisiana, 136 S. Ct. 718, 732–34 (2016), as revised (Jan. 27, 2016) (concluding that rule announced in Miller v. Alabama, 567 U.S. 460 (2012), was substantive and applied retroactively because it "rendered life without parole an unconstitutional penalty" for a class of defendants—namely,

"juvenile offenders whose crimes reflect the transient immaturity of youth"); Bejarano, 122 Nev. at 1076–79, 146 P.3d at 272–74 (explaining that substantive aspects of this Court's ruling in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), included narrowing types of defendants subject to death penalty); cf. Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843, 849 (2014) (explaining that burden of proof is substantive aspect of patent claim); Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 20–21 (2000) ("Given its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim."); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994); ("[T]he assignment of the burden of proof is a rule of substantive law . . .).[7]

It is immaterial that Hurst can also be read to include a procedural component—that jurors consider aggravating and mitigating circumstances under the reasonable-doubt standard. As the United

[7] The United States Court of Appeals for the Ninth Circuit recently suggested that Montgomery and Welch v. United States, 136 S. Ct. 1257 (2016), expanded the category of rules qualifying as "substantive" to include any rule that "invalidate[s] every result" for a class of individuals, regardless if that class shares any "intrinsic quality." Alfaro v. Johnson, 862 F.3d 1176, 1185 n.5 (9th Cir. 2017).

States Supreme Court explained in Montgomery, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." 136 S. Ct. at 735. For example, "when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." Id. But "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones." Id.; see Powell, 153 A.3d at 74 ("The burden of proof is one of those rules that has both procedural and substantive ramifications.").

4. Ybarra v. Filson does not change Ybarra's argument that Hurst applies retroactively in Nevada

The Ninth Circuit's decision in Ybarra's federal case does not preclude relief in this Court. There, the United States Court of Appeals for the Ninth Circuit denied Ybara leave to file a second or successive post-conviction petition in federal district court raising a claim under Hurst. 869 F.3d 1016, 1031–33 (9th Cir. 2017). In order to file a second or successive petition, a petitioner is required to show that he is relying

on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). And the Ninth Circuit noted that it could decide the case "on the . . . narrow ground that, even if Hurst applied retroactively, the Supreme Court has never held that it applies retroactively." Ybarra, 869 F.3d at 1033. The court went further, however, and "den[ied] Ybarra's application on the broader ground that Hurst does not apply retroactively at all—with regard to either initial or successive habeas petitions." Id.

As an initial matter, the court's conclusion that Hurst does not apply retroactively to initial or successive habeas petitions was unnecessary for resolution of the petition, which depended on whether the Supreme Court had "made" Hurst retroactive, 28 U.S.C. § 2244(b)(2)(A). And the court's unnecessary statements should be given even less persuasive weight because 28 U.S.C. § 2244(b)(3)(E) prevented Ybarra from filing a petition for rehearing or certiorari.

But, more importantly, Ybarra does not affect Ybarra's claim for the same reason that Schriro does not—it relies on the federal retroactivity standards, which require procedural rules to be of watershed

significance. In addition, in deciding that the rule announced in Hurst was not substantive, the court relied on Sanchez-Cervantes, 282 F.3d at 668–71, which held that Apprendi was not retroactive. But the decision in Sanchez-Cervantes, in considering whether Apprendi announced a substantive rule, addressed only whether it placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority." Id. at 668. Of course Apprendi did not "decriminalize[] drug possession or drug conspiracies nor place[] such conduct beyond the scope of the state's authority to proscribe." Id. But the court did not address whether the rule "alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353; see Colwell, 118 Nev. at 820, 59 P.3d at 472. And the court in Ybarra did not address significant retroactivity decisions postdating Sanchez-Cervantes, Montgomery, 136 S. Ct. 718, and Welch, 136 S. Ct. 1257. See Alfaro, 862 F.3d at 1185 n.5 (suggesting that Welch and Montgomery expanded the category of rules qualifying as substantive to include any rule that invalidates every result for a class of individuals).

D. The District Court Erred in Concluding that Ybarra's Petition Is Procedurally Barred

1. Ybarra can overcome any procedural bars because he has shown good cause and prejudice

The district court concluded that Ybarra's petition is procedurally barred after concluding that it was untimely under NRS 34.726(1) and successive under NRS 34.810(2). But Ybarra can overcome any applicable procedural default because he has shown good cause for the filing of his claim and has demonstrated that dismissal of the petition as untimely would be unduly prejudicial. See Powell, 122 Nev. at 756, 138 P.3d at 456; Clem, 119 Nev. at 620, 81 P.3d at 525.

Turning first to good cause, Ybarra was required to show that an "impediment external to the defense" prevented him from raising his claim in an earlier petition. Clem, 119 Nev. at 621, 81 P.3d at 525; see Powell, 122 Nev. at 756, 138 P.3d at 456; see also NRS 34.726(1)(a) (explaining that good cause exists if "delay is not the fault of the petitioner"). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." Clem, 119 Nev. at 621, 81 P.3d at 525; see Bejarano, 122 Nev. at 1071–73, 146 P.3d at 269–71; see also Murray v. Carrier, 477 U.S. 478,

488 (1986) (noting that "a showing that the factual or legal basis for a claim was not reasonably available to counsel" would constitute "cause" under federal default standard); Reed v. Ross, 468 U.S. 1, 14–16 (1984) (explaining that cause to excuse prejudicial default in federal court is shown if claim previously had "no reasonable basis in existing law").

Ybarra has established good cause for the filing of his petition because the claims that he is now making were not reasonably available until 2016, when the Supreme Court of the United States issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016). See Bejarano, 122 Nev. at 1073, 146 P.3d at 270 (concluding that good cause excused delay in filing when claim based on new rule from this Court). The Court in Hurst held for the first time that a determination that the mitigating circumstances do not outweigh the aggravating circumstances, when required by a state for imposition of the death penalty, is a "fact" that increases a defendant's statutory maximum punishment. As a result, the weighing determination constitutes an "element" of the charged offense that is subject to various procedural protections under the Due Process Clause and the Sixth Amendment: namely, it must be determined by a jury and proven by the State beyond a reasonable doubt. Thus, the

outweighing claim was not previously available. Hurst also provides good cause for challenging the depravity-of-mind aggravating circumstance because, in invalidating this Court's practice of reweighing aggravating and mitigating circumstances, Hurst provides that this Court cannot cure the depravity-of-mind error without granting Ybarra a new penalty phase.

Moreover, this Court has held that good cause to overcome a state procedural default exists when "a federal court concludes that a determination of this court is erroneous." Evans v. State, 117 Nev. 609, 644, 28 P.3d 498, 521 (2001), overruled in part on other grounds by Lisle, 351 P.3d at 733 n.5; see Lozada v. State, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994), overruled in part on other grounds by Rippo v. State, 132 Nev. __, 368 P.3d 729, 742 n.16 (2016); cf. Colwell, 118 Nev. at 821, 59 P.3d at 472–73 (concluding that Ring was a new rule, not merely an extension of the Apprendi line of cases, because it overruled precedent). And, in Hurst, the United States Supreme Court effectively overruled this Court's decisions in McConnell, 125 Nev. 243, 212 P.3d 307, and Nunnery, 127 Nev. 749, 263 P.3d 235. After Hurst, every finding necessary to render a defendant "eligible for the death penalty" is an

element that must be found by the jury beyond a reasonable doubt. Hurst, 136 S. Ct. at 622. But in McConnell and Nunnery, this Court held that the weighing determination, although part of the eligibility phase in Nevada, was not a "factual" determination subject to the procedural protections of the Due Process Clause and the Sixth Amendment. See Nunnery, 127 Nev. at 772–76, 263 P.3d at 250–53; McConnell, 125 Nev. at 253–54, 212 P.3d at 314–15.[8] These holdings are in conflict with, and consequently do not survive, the decision in Hurst.

The second requirement to excuse procedural default also was met: Ybarra has demonstrated undue prejudice. See NRS 34.726(1)(b), 34.810(3)(b); Bejarano, 122 Nev. at 1072, 146 P.3d at 270. "A showing of undue prejudice necessarily implicates the merits" of the allegedly defaulted claim. Rippo v. State, 132 Nev. ___, 368 P.3d 729, 740 (2016), reh'g denied (May 19, 2016), cert. granted on other grounds, judgment vacated sub nom. Rippo v. Baker, 137 S. Ct. 905 (2017); see Bejarano, 122 Nev. at 1073, 146 P.3d at 270–71. And, as set out in more detail in Sections A and C, Ybarra can succeed on the merits of his Hurst claim

[8] As a result, had Ybarra attempted to raise these claims before Hurst, his petition would have been rejected.

because Hurst applies retroactively, and he was deprived of the constitutional protections to which Hurst entitles him: The court at his capital sentencing hearing did not instruct the jury that the State had to prove beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. See §§ A, C above. Moreover, Ybarra can succeed on his challenge to the depravity-of-mind aggravating circumstance because it is unconstitutional and this Court cannot, after Hurst, cure that defect without granting Ybarra a new penalty phase. See § B above.

Consequently, because Ybarra's petition is based on a meritorious argument under the new rule established in Hurst, and he timely filed his petition within one year of the Court's decision, see Rippo, 368 P.3d at 739–40, the district court erroneously concluded that he had not established good cause and prejudice to excuse any procedural default.

2. Ybarra's petition is not procedurally defaulted because he has established a miscarriage of justice

In addition, no procedural default can bar this petition because "failure to consider the petition on its merits would amount to a fundamental miscarriage of justice." See Berry v. State, 131 Nev. ___, 363

P.3d 1148, 1154 (2015) (explaining that a habeas petitioner can overcome procedural bars "and secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice"); see also Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This Court has held that this standard is met when a petitioner "makes a colorable showing" that he "is ineligible for the death penalty." Pellegrini, 117 Nev. at 887, 34 P.3d at 537; see Bejarano, 122 Nev. at 1072, 146 P.3d at 270; Leslie, 118 Nev. at 780, 59 P.3d at 445. And, when an aggravating factor considered by the jury has subsequently been held invalid, a miscarriage of justice is shown if "there is a reasonable probability that absent the aggravator the jury would not have imposed death." Bejarano, 122 Nev. at 1072, 146 P.3d at 270 (citation and internal quotation marks omitted); see Leslie, 118 Nev. at 780, 59 P.3d at 445 (reasoning that a defendant has made colorable showing of ineligibility for the death penalty if there is a "reasonable probability" that, absent an invalid aggravating factor, mitigating evidence will outweigh the remaining aggravating factor).

Before Hurst, this Court has concluded in factually similar circumstances that applying procedural bars would result in a

fundamental miscarriage of justice. In Leslie, this Court considered whether there was a reasonable probability that, absent two invalid aggravating factors out of the original four, the jury would find the petitioner ineligible for the death penalty. 118 Nev. at 783, 59 P.3d at 447. This Court pointed out that the petitioner had "presented significant mitigating evidence," including his young age at the time of the murder, his lack of significant criminal history, and his family's testimony that "they knew him to be a good person," and reasoned that there was "a reasonable probability that absent the aggravator the jury would not have imposed death." Id. at 780, 783, 59 P.3d at 445, 447. So, this Court concluded, "imposing the waiver bar to this claim would amount to a fundamental miscarriage of justice." Id. at 780, 59 P.3d at 445.

Similarly, in Bennett, this Court struck one of four aggravating circumstances considered by the jury during sentencing. 119 Nev. at 596–97, 81 P.3d at 6–7. This Court then explained that the jury had heard mitigating evidence relating to the petitioner's lack of criminal history, youth, alcohol and drug use, learning disabilities, and possible mood disorder. Id. at 605, 81 P.3d at 11. Considering that mitigation

evidence against the remaining aggravating circumstances, this Court stated that it could not "conclude beyond a reasonable doubt that the jury would have imposed the death penalty in the absence of the erroneous aggravator and the State's Brady violations." Id. at 605, 81 P.3d at 11–12.

Like the petitioners in Leslie and Bennett, Ybarra has made a colorable showing that he is ineligible for the death penalty. As shown above, one of the aggravating circumstances in this case is unconstitutional. See § B above. Removing this aggravating circumstance, this Court cannot conclude beyond a reasonable doubt that the jury would have imposed the death penalty. See Clem, 119 Nev. at 605, 81 P.3d at 11-12.

Moreover, this analysis must be performed in a new sentencing proceeding where the State must prove beyond a reasonable doubt that mitigating circumstances are not outweighed by the aggravating circumstances. Using this standard for the jury's outweighing determination, Ybarra has made a colorable showing that the jury would resolve its outweighing determination in his favor, finding him ineligible for the death penalty.

VII. CONCLUSION

Based on the foregoing, Ybarra respectfully requests that this Court reverse the district court, grant Ybarra a new penalty hearing, and remand for proceedings consistent with such relief.

DATED this 30th day of November, 2017.

Respectfully submitted,

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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 30, 2017. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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White Pine County District Attorney

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District of Nevada