IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,

Appellant,

vs.

TIMOTHY FILSON, WARDEN, ELY STATE PRISON; AND ADAM P. LAXALT, NEVADA ATTORNEY GENERAL,

Respondent.

Case No. 72942

RESPONDENTS' ANSWERING BRIEF

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I. STATEMENT OF THE ISSUES

> Whether the district court erred in dismissing Petitioner Robert Ybarra Jr.'s untimely and successive petition after concluding that (1) the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), does not establish good cause and prejudice to overcome Ybarra's procedural defaults, and (2) Ybarra failed to show actual innocence of the death penalty.

II. STATEMENT OF THE CASE[1]

Petitioner Robert Ybarra, Jr. seeks relief from his capital sentence for the brutal 1979 kidnapping, battery, sexual assault, and murder of sixteen-year-old Nancy Griffith. In a petition for writ of habeas corpus (post-conviction) that he filed in the Seventh Judicial District Court on January 11, 2017, Ybarra alleges that his sentence is unconstitutional because (1) the trial court did not instruct the jury that it had to determine that the mitigating circumstances did not outweigh the statutory aggravating factors beyond a reasonable doubt under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and (2) one of the statutory aggravating factors found by the jury is vague and overbroad, under *Godfrey v. Georgia*, 446 U.S. 420 (1980). 7 AA 1620-42. The district court dismissed the petition as procedurally defaulted

[1] This Court is undoubtedly familiar with the factual circumstances of this case. Accordingly, Respondents limit their statement of the case to facts relevant to the issues before this Court. A detailed factual recitation of the offense and trial may be found in this Court's opinion from Ybarra's direct appeal. *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984) (hereinafter *Ybarra I*).

under NRS 34.726 and NRS 34.810 without calling for an answer from the Respondents. 7 AA 1646-55. Ybarra filed a notice of appeal and challenges the district court's ruling here. 7 AA 1657-60.

In 1981, a Nevada jury found Ybarra guilty of sexual assault with substantial bodily harm, battery with intent to commit sexual assault with substantial bodily harm, kidnapping in the first degree with substantial bodily harm, and first-degree murder. 6 AA 1292-95. The jury sentenced Ybarra to life without a possibility of parole on the counts for sexual assault, kidnapping, and battery. 6 AA 1293-95. And after a penalty hearing, the jury sentenced Ybarra to death after finding that the State proved four aggravating factors and that no mitigating circumstances outweighed the aggravating factors. 6 AA 1461-62. This Court affirmed Ybarra's conviction and sentence on appeal, including denying Ybarra's vagueness challenge the "depravity of mind" aggravating factor. *Ybarra I*, 100 Nev. at 177, 679 P.2d at 803.

In the ensuing years, Ybarra has sought, and been denied, post-conviction relief in both state court (multiple times) and in federal court. Most significantly, this Court affirmed dismissal of Ybarra's claim that the absence of a jury instruction requiring the jury to find that the aggravating factors are not outweighed by the mitigating circumstances beyond a reasonable doubt violates the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584 (2002). 6 AA 1615.

And the United States Court of Appeals for the Ninth Circuit, on federal habeas review, has rejected challenges to Ybarra's sentence under *Godfrey* and *Hurst*, by (1) concluding that any error under *Godfrey* was harmless because the jury still would have found that the State proved the aggravator that the murder "involved torture, depravity of mind, or mutilation of the victim," if given a properly narrowed definition "depravity of mind," *Ybarra v. McDaniel*, 656 F.3d 984, 994-96 (9th Cir. 2011) (hereinafter *Ybarra II*), and (2) concluding that *Hurst* does not apply retroactively to cases on collateral review, *Ybarra v. Filson*, 869 F.3d 1016, 1030-34 (9th Cir. 2017) (hereinafter *Ybarra III*).

III. SUMMARY OF THE ARGUMENT

The district court correctly dismissed Ybarra's petition as procedurally defaulted. This Court has repeatedly affirmed dismissal of Ybarra's rote attempts to seek habeas relief as procedurally defaulted, and this case should be no different. Ybarra's petition is untimely under NRS 34.726,[2] and barred by both NRS 34.810(1)(b)(2) and NRS 34.810(2).[3] And he fails to show cause and prejudice or a fundamental miscarriage of justice to overcome his defaults.

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[2] In addition to being untimely, the instant petition would also be barred by laches under NRS 34.800. However, because the district court dismissed the petition without calling for a response, Respondents never had a chance to plead the laches bar.

[3] Regardless of whether Ybarra's claims are new or repetitions of old claims, Ybarra's petition is a second or successive petition that is defaulted under NRS

Ybarra endeavors to convince this Court that *Hurst*, when considered with numerous other cases, *impliedly* held that his sentence violates the Sixth Amendment under the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the jury was not instructed that they had to apply a beyond a reasonable doubt standard when weighing aggravating factors and mitigating circumstance. Opening Brief (hereinafter OB) at 6-31. And he further argues that this implied rule from *Hurst* must be retroactively applied. OB at 39-50.

Ybarra charges the district court with engaging in a selective, narrow reading of *Hurst*.[4] OB at 23. It is Ybarra who is cherry-picking statements from *Hurst* to support his desired reading of that case and its impact on capital

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34.810(2). If this Court elects to treat them as repetitions of prior claims and apply the doctrine of law of the case based upon a prior adjudication of the merits of Ybarra's claims, this Court should do so in a way that makes clear that this Court's application of law of the case is an alternative holding that is independent of this Court's application of any defaults applied under NRS 34.726 and NRS 34.810. This will protect the adequacy and independence of any procedural rulings based upon state law. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (noting that an alternative holding reaching the merits of a claim does not undermine the adequacy or independence of a state procedural bar).

[4] While trying to avoid language from *Kansas v. Carr*, 136 S. Ct. 633 (2016)—an opinion issued a month after the Court issued *Hurst*, Ybarra contradicts himself on this point. He instructs this Court to disregard statements from *Carr* that completely undermine his reading of *Hurst* as dicta because they are not "essential" to the Court's holding in *Carr*. See OB at 28. He cannot have it both ways. If this Court is to limit its reading of *Carr* to only those matters essential to the Court's holding in that case, then the district court did not err in limiting its reading of *Hurst* in a similar fashion.

sentencing law. A plain reading of *Hurst* shows that the Court limited its ruling to addressing *Ring*'s impact on Florida's sentencing scheme and an older line of cases that authorized Florida's capital sentencing framework. *Hurst*, 136 S. Ct. at 621-24. The Court concluded that, under *Ring*, Florida's capital sentencing framework violated the Sixth Amendment, and *partially* overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1988), on a single issue: those cases permitted the judge, not the jury, to make the ultimate factual determination on the existence of the *aggravating circumstances* that established a defendant's eligibility for a capital sentence. *Hurst*, 136 S. Ct. at 624.

Hurst's holding says nothing about weighing being a factual determination that falls within the Sixth Amendment right to trial by jury. The only thing actually decided in *Hurst* is that the Florida's sentencing scheme violated the Sixth Amendment under *Ring* because it made the judge the finder of fact with respect to the existence of aggravating factors necessary for a death sentence. *Id*. at 621-24. As a result, *Hurst* does not create a new rule, let alone a retroactive rule that would excuse Ybarra's procedural defaults.

In addition to the untenable nature of Ybarra's reading of *Hurst*, numerous other opinions of the United States Supreme Court and this Court undermine Ybarra's position. First, the long line of cases that follow *Apprendi*—the foundation of *Hurst*—recognize that the jury's fact-finding function for purposes

of determining the range of available punishments are distinct from the Eighth Amendment issue of selecting the appropriate sentence for an individual defendant. *Cunningham v. California*, 549 U.S. 270, 294 (2007) (acknowledging universal agreement that leaving the judge with broad discretion to select the appropriate sentence from a range of punishments does not violate the Sixth Amendment). And the aspects of the holding from *Spaziano* that survive *Hurst* further support the conclusion that *Hurst* does not displace the distinction between sentence eligibility and sentence selection. *Spaziano*, 468 U.S. at 457-65 (rejecting a challenge to the judge selecting the sentence under the Sixth Amendment); *see also Carr*, 136 S. Ct. at 642 (expressing doubt about application of a burden of proof to the weighing determination).

Additionally, the core of Ybarra's argument on *Hurst* merely rehashes an issue this Court already decided in *Nunnery v. State*, 127 Nev. 749, 163 P.3d 235 (2011). In *Nunnery*, this Court squarely rejected the premise that the weighing component of Nevada's capital sentencing scheme is a factual determination that falls within the scope of the Sixth Amendment right to trial by jury under the *Aprendi* and *Ring* line of case. *Nunnery*, 127 Nev. at 770-77, 163 P.3d at 250-54. This point is further supported by this Court's recent rejection of a claim that new mitigation evidence could be used to establish a petitioner's actual innocence of the death penalty, while reaffirming this Court's recognition of the distinction

between sentence eligibility and sentence selection. *Lisle v. State*, 131 Nev. __, __, 351 P.3d 725, 730-34 (2015). But Ybarra fails to address the doctrine of *stare decisis*, save for his incorrect assertion that *Hurst* impliedly compels this Court to treat weighing as an element of capital eligibility for Sixth Amendment purposes.

Furthermore, even assuming *Hurst* establishes a new rule, Ybarra fails to show that this Court must apply it retroactively. OB at 39-50. Any new rule established by *Hurst* is not a substantive rule, nor does it undermine the reliability of the verdict in a way that requires its retroactive application, for the very same reasons this Court found that *Ring* did not meet the exceptions to non-retroactivity of a new rule in *Colwell v. State*, 118 Nev. 807, 815-23, 59 P.3d 463, 469-74 (2002). This is true, even if this Court gives *Hurst* the (unwarranted) generous reading that the Ninth Circuit did in Ybarra's federal appeal. Thus, Ybarra has not shown good cause and prejudice to overcome his defaults with respect to the *Hurst* claim.

Additionally, Ybarra's attempt to establish cause and prejudice or a fundamental miscarriage of justice with respect to his challenge to the depravity of mind aggravator also falls short. In addition to the fact that his challenge to the jury instructions on the depravity aggravator are entirely dependent upon his failed attempt to establish that *Hurst* creates a new, retroactive rule, he fails to make a plausible link between retroactivity of *Hurst* and his challenge to the

constitutionality of the aggravator. *Hurst* says nothing about vagueness of aggravating circumstances; Ybarra's challenge to the depravity aggravator itself is based upon cases decided decades ago. OB at 31-33.

Even assuming he can establish cause, he fails to establish actual prejudice. Any error is harmless under *Chapman v. California*, 386 U.S. 18 (1967), because there is no reason to doubt the jury still would have found the aggravator proven if a limiting instruction had been given. Alternatively, if this Court were to reweigh the evidence against any remaining aggravators, the jury still would have found Ybarra eligible for a capital sentence and imposed the same in the absence of the depravity aggravator.

The district court did not err in dismissing the petition as procedurally defaulted. This Court should affirm.

IV. ARGUMENT

Ybarra asks this Court to conclude that *Hurst* creates a new, retroactive rule that establishes good cause and actual prejudice to overcome his procedural defaults. This Court should reject his position. This Court already procedurally defaulted Ybarra's attempt to attack his sentence under *Ring*, and the Ninth Circuit already rejected Ybarra's *Hurst*-based claims by concluding that *Hurst* is not retroactive. More importantly, Ybarra's position is unsupported by the *Hurst* decision, the rationale of the line of cases beginning with *Apprendi*, the remaining

holding of *Spaziano*, and this Court's decisions in *Nunnery* and *Lisle*. Rather, Ybarra has not presented this Court with any reason to depart from the principle of *stare decisis* beyond his strained reading of *Hurst*, which means *Nunnery* and *Lisle* control.[5]

His attempt to challenge the depravity aggravator also fails. In addition to the fact that *Hurst* does not establish cause for his default, he fails to establish actual prejudice because the alleged error is harmless, and the jury would have still sentenced Ybarra to death in the absence of the depravity aggravator.

Finally, Ybarra also fails to establish a fundamental miscarriage of justice. Accordingly, this Court should affirm the judgment of the district court.

[5] The Ninth Circuit only reached the issue of retroactivity after making "generous assumptions," without concluding, that credited Ybarra's reading of *Hurst*. *Ybarra III*, 869 F.3d at 1031. But the United States District Court for the District of Nevada has not made the same generous assumptions. *See* Order, *Sonner v. Filson*, No. 2:00-cv-01101-KJD-CWH, 2017 WL 3741975 at *21 (D. Nev., August 29, 2017) (noting the limited nature of the holding from *Hurst* does not make weighing an element). That court has found the *Hurst*-based arguments attacking capital sentences from Nevada to be so plainly lacking merit that the claims do not warrant granting a stay to allow a petitioner to return to state court to exhaust the claim. *See, e.g.*, Order, *Castillo v. Filson*, No. 2:04-cv-00868-RCJ-GWF, 2017 WL 4127745 at *3-7 (D. Nev., August 18, 2017); Order, *Emil v. Filson*, No. 3:00-cv-00654-KJD-VPC, 2017 WL 4799786 (D. Nev., October 23, 2017). Other federal courts have rejected Ybarra's reading of *Hurst* is not retroactive. *See, e.g.*, *Davila v. Davis*, 650 Fed.Appx. 860, 872-73 (5th Cir. 2016).

A. The district court correctly determined that Ybarra defaulted his claims under NRS 34.726 and NRS 34.810.

Remittitur from Ybarra direct appeal issued March 4, 1985. 7 AA 1609. Although NRS 34.726 was not in effect in 1985, this Court granted those inmates with final convictions a one-year grace period from the January 1, 1993 effective date for NRS 34.726 to comply with the new timing requirement. *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001). That grace period obviously expired long ago and is of no help to Ybarra now. Accordingly, Ybarra's entire petition is defaulted under NRS 34.726. Additionally, Ybarra's current claims challenge his sentence. A claim challenging a defendant's sentence is properly addressed on direct appeal that is defaulted under NRS 34.810(1)(b)(2). And because Ybarra has already filed multiple state post-conviction actions, his petition constitutes second or successive petition under NRS 34.810(2).

B. The district court correctly determined that *Hurst* would not establish cause and prejudice for Ybarra's default.

This Court has recognized that a petitioner may establish good cause for a procedural default where his claim was previously unavailable and raised within one year of when the claim became available. *Rippo v. State*, 132 Nev. __, __, 368 P.3d 729, 734 (2016); *see also Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). In addition to showing cause, a petitioner must show he will suffer actual prejudice if his claims are defaulted. *Pellegrini*, 117 Nev. at 887, 34

P.3d at 537 ("[A]ctual prejudice requires showing not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.") (internal quotations omitted and brackets in original).

Hurst did not create a new rule, let alone a retroactive rule that would support a showing cause and prejudice to overcome the default. The holding of *Hurst* does not even require treating weighing as an element of capital sentencing that comes within the scope of the Sixth Amendment. Even if it did, such a rule would not apply retroactively. As a result, Ybarra fails to establish cause and prejudice to overcome his defaults.

1. Retroactivity in general.

For purposes of retroactivity analysis, this Court has generally adopted the framework for retroactivity set forth by *Teague v. Lane*, 489 U.S. 288 (1989), but reserves its authority to determine when rules are new and fall within *Teague*'s exceptions to non-retroactivity.[6] *Colwell*, 118 Nev. at 819, 59 P.3d at 471-72. The first step in this Court's retroactivity analysis is determining whether rule is new.

[6] As this Court has noted, state court decisions on retroactivity are not binding on the courts of other states. *Colwell*, 118 Nev. at 818, 59 P.3d at 471. Thus, Ybarra's reliance on decisions from other states to suggest that *Hurst* is retroactive has little persuasive value.

Id. at 820, 59 P.3d at 472. If there is a new rule then this Court must determine whether the conviction was final prior to establishment of the rule. *Id*. Third, the Court must determine whether the rule is substantive or a retroactive procedural rule. *Id*.

This Court has identified a substantive rule as a rule establishing "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." *Id.* at 472, 59 P.3d at 820. And a retroactive procedural rule is a rule that "establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 472, 59 P.3d at 820.

2. *Hurst* does not serve as good cause because it does not establish anything new.

Ybarra asks this Court to determine that *Hurst* creates a specific rule about the burden of proof a jury must apply when weighing aggravating and mitigating circumstances. OB at 12-16. But *Hurst* does not establish such a rule. *Hurst* merely applied *Ring*, which held that Arizona's system of having judges sitting as the finder of fact with respect to the existence of aggravating factors supporting a capital sentence violated the Sixth Amendment. 136 S. Ct. at 621-24. And, although this Court determined that *Ring* established a new rule—more than 15 years ago—it declined to apply *Ring* retroactively. *Colwell*, 1128 Nev. at 821-22, 59 P.3d at 473.

More importantly, the rule Ybarra pulls from *Hurst* would displace well-established precedent in areas that were not at issue in *Hurst*. The United States Supreme Court has agreed, and continues to agree, with this Court's position that weighing is a moral determination that is made for purposes of sentence selection to satisfy Eighth Amendment concerns regarding an individualized sentencing determination. *See Carr*, 136 S. Ct. at 642; *Boyde v. California*, 494 U.S. 370, 376-77 (1990) (acknowledging that the challenged jury instruction "was consistent with the Eighth Amendment, because a reasonable juror would interpret the instruction as allowing for the exercise of discretion and moral judgment about the appropriate penalty in the process of weighing the aggravating and mitigating circumstances."); *Lisle*, 131 Nev. at __, 351 P.3d at 730-33; *Nunnery*, 127 Nev. at 772-76, 263 P.3d at 251-53.

Hurst does not displace this Court's, and the United States Supreme Court's, understanding of the role of weighing in capital sentencing. All that *Hurst* did is apply the holding from *Ring*, which recognizes the jury must find that the State proved the *aggravating* circumstances beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 622-24. Indeed, to read *Hurst* broadly, as Ybarra suggests this Court should, conflicts with Ybarra's own characterization of how to determine the breadth of the holding from a court opinion. See OB at 27 (asserting that statements not essential to a court's holding are dicta). Any discussions of weighing by the Hurst

Court, according to Ybarra's view on the scope of a Court's holding, is dicta because it was not essential to the district court's determination that Hurst's sentence violated the Sixth Amendment under *Ring*.

Hurst does not establish the new rule that Ybarra seeks. His arguments for cause and prejudice fail.

a. A plain reading of *Hurst* does not align with Ybarra's characterization of the case.

In *Hurst*, the Court granted review "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." 136 S. Ct. at 621. The Supreme Court answered that question in the affirmative. *Id.* at 622 ("In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."). In prodding the Court to reach that conclusion, Hurst began his merits brief by arguing that (1) Florida law required the State to prove "beyond a reasonable doubt at least one statutory aggravating circumstance" before a defendant can be sentenced to death, and (2) with "the existence of a statutory aggravator circumstance [being] a condition to the defendant's eligibility for a death sentence," the existence of an aggravator is a "determination that must 'be entrusted to the jury.' *Ring v. Arizona*, 536 U.S. 584, 597 (2002)." Br. for Pet. at 1, *Hurst v. Florida*, No. 14-7505, (U.S., May 28, 2015).[7] The Court agreed with

[7] A copy of the brief can be accessed at: http://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/Hurst-merits-brief.pdf.

Hurst and remanded for a determination of whether the error in his sentencing proceeding was harmless. Thus, all the Court did in *Hurst* is apply *Ring*.

Ybarra's suggestion that *Hurst* does more than apply *Ring* to Florida's sentencing scheme is not supported by the Court's analysis in *Hurst*. A review of the *Hurst* decision in its entirety tells a story that starkly contrasts Ybarra's representations of the opinion's holding, which ultimately focuses on the trial judge finding the existence of *aggravating* circumstances. *Hurst*, 136 S. Ct. at 621-24 (determining that Hurst's sentence violated the Sixth Amendment under *Ring* and overruling prior Supreme Court precedents "to the extent they allow a sentencing judge to find an *aggravating circumstance*, independent of a jury's factfinding, that is necessary for imposition of the death penalty"). *Hurst* does not say that weighing is a factual determination that falls within the scope of the Sixth Amendment.

b. Other decisions of the Supreme Court of the United States and this Court support the Respondents' position

While this Court need not look beyond the text of *Hurst* to see that Ybarra's reading of *Hurst* is untenable, Respondents' position is further supported by (1) the *Apprendi* line of cases that led to the *Ring* and *Hurst* decisions; (2) the holding of *Spaziano* that remains intact post-*Hurst*, and (3) the plethora of other decisions of the Supreme Court of the United States and this Court establishing that weighing is a moral determination.

i. *Apprendi*'s rule does not impact Eighth Amendment concerns governing sentence selection.

The *Hurst* decision is the most recent statement of the Supreme Court of the United States on a principle grounded in the Sixth Amendment's right to trial by jury. This series of decisions, including *Cunningham*; *Booker v. United States*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004), and *Ring*, all derive from the base rule recognized in *Apprendi*: that all *facts* necessary to impose an enhanced sentence must be proven to a jury beyond a reasonable doubt. But these cases decidedly have no impact on the moral determination of selecting the proper sentence for an individual defendant. *See Cunningham*, 549 U.S. at 294 ("Other States have chosen to permit judges genuinely 'to exercise broad discretion … within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 223, 125 S. Ct. 738.") (citations omitted); *see also see Patterson v. New York*, 432 U.S. 197 (1977) (recognizing that a state does not have the burden to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment"). Rather, the selection of the sentence to be imposed—in both the capital and non-capital contexts—is a moral determination that does not trigger the protections of the Sixth Amendment right to trial by jury.

As this Court knows, this distinction is critical in the capital context. *See, e.g.*, *Lisle*, 131 Nev. at __, 351 P.3d at 730-34. After *Gregg v. Georgia*, 428 U.S. 153 (1976), states must impose restrictions that narrow the class of persons eligible for a capital sentence to comply with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Narrowing is achieved through one of two means: a state can narrowly define capital offenses, or it can identify narrowly defined aggravating circumstances. *See, e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988). In contrast, states cannot limit the consideration of mitigating evidence to ensure that every defendant receives an individualized sentencing determination. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The individualized sentencing determination is the function of *sentence selection*, a moral determination that is *not* based upon the absence or existence of a fact. *Boyde*, 494 U.S. at 376-77 (acknowledging that the challenged jury instruction "was consistent with the Eighth Amendment, because a reasonable juror would interpret the instruction as allowing for the exercise of discretion and moral judgment about the appropriate penalty in the process of weighing the aggravating and mitigating circumstances."); *see also Carr*, 136 at 642. *Hurst* does not displace this distinction.

ii. *Hurst*'s limited overruling of *Spaziano* emphasizes the point that sentence selection does not fall within the scope of the Sixth Amendment right to trial by jury.

That the Supreme Court issued a narrow holding, only partially overruling *Spaziano*, emphasizes that *Hurst* did not transform weighing into an "element" for Sixth Amendment purposes. In *Spaziano*, the Court held that the Sixth Amendment has no impact on *sentence selection*. 468 U.S. at 459-62. Because the Court left that aspect of *Spaziano* intact, *Hurst* unquestionably does not displace the well-established distinction between eligibility for a sentence enhancement and sentence selection.

The record from the Supreme Court shows that the Court avoided the issue altogether. Hurst asked the Supreme Court to conclude that allowing the judge to determine the sentence—as opposed to deciding whether facts exist that make a defendant eligible for a sentence—violates the Constitution and overrule *Spaziano* entirely. Br. for Pet. at 26-31, *Hurst v. Florida*, No. 14-7505, (U.S., May 28, 2015). But the Court declined to do so, choosing to limit its overruling of *Spaziano* to the extent *Spaziano* authorized a judge to determine the *existence of any aggravating circumstances*. *Hurst*, 136 S. Ct. at 624.

Ybarra all but concedes this point with his emphasis on Justice Sotomayor's dissent to the denial of certiorari from *Woodward v. Alabama*, 134 S. Ct. 405 (2013), which is highly distinguishable from her majority opinion in *Hurst*. It goes

without saying that this Court is bound by holdings from an opinion joined by a majority of the Supreme Court of the United States, not a dissenting opinion representing the views of a minority of the Court. Justice Sotomayor could only muster the support of one other justice in presenting a full-blown attack on Alabama's system of having the jury determine the existence of any aggravating factors but leaving the judge to decide the sentence in *Woodward*, while she persuaded a majority of the Court to join her more limited focus on the application of *Ring* within the *Hurst* opinion. The distinction between Justice Sotomayor's dissenting opinion in *Woodward* and her majority opinion in *Hurst* completely undercuts Ybarra's desired reading of *Hurst* and its impact on this case.

iii. This Court's holdings from *Nunnery* and *Lisle* control, and Ybarra, therefore, cannot show prejudice.

Hurst does nothing more than apply *Ring* to Florida's capital sentencing framework. 136 S. Ct. at 621-24. And this Court has already addressed the impact of *Ring* on Nevada's capital sentencing scheme. In *Nunnery*, this Court concluded that the weighing aspect of capital sentencing in Nevada is not a factual determination that fits within the scope of the Sixth Amendment right to trial by jury. *Nunnery*, 127 Nev. at 770-77, 163 P.3d at 250-54. Just as the United States Supreme Court has noted, this Court acknowledged that the weighing aspect of

capital sentencing is a moral determination involving sentence selection. *Id*. *Hurst* does not require anything different.

Additionally, this Court was more recently presented with whether the weighing aspect of capital sentencing is an element of sentence eligibility. *Lisle*, 131 Nev. at __, 351 P.3d at 730-33. Lisle asserted that he is actually innocent of the death penalty based on newly presented mitigating evidence. Looking to *Sawyer v. Whitley*, 505 U.S. 333 (1992), as persuasive authority on application of the actual innocence standard, this Court determined that a person is eligible for a capital sentence if the State has proven an aggravating factor beyond a reasonable doubt. *Id*. While this Court acknowledged that it has used the term eligibility as having different meaning in other opinions, for purposes of applying Eighth Amendment principles of (1) narrowing the class of persons eligible for a death sentence, and (2) individualized sentencing determinations, eligibility addresses the narrowing requirements, while weighing is a function of sentence selection that is designed to satisfy the Eighth Amendment requirement of an individualized sentencing determination. *Id*.

Nothing in *Hurst* requires this Court to rethink this Court's decisions on how to construe Nevada law and its relationship to the Sixth Amendment in this context. While other state courts may have decided to apply a beyond a reasonable doubt standard to the weighing component of their capital sentencing schemes,

Hurst does not mandate this Court to reach that same conclusion. Accordingly, this Court's strong adherence to the doctrine of *stare decisis* controls the outcome of this case.

c. If *Hurst* creates a new rule, Ybarra still fails to show cause and prejudice.

If *Hurst* establishes a new rule, it is limited by the *partial* overruling of *Sapzino* and *Hildwin*. *See Colwell*, 118 Nev. 821, 59 P.3d at 473 ("Because *Ring* dealt with conflicting prior authority and expressly overruled precedent in announcing its rule, we conclude that the rule is new."). The Court only overturned *Spaziano* and *Hildwin* to the extent they authorized the judge to find the aggravating factors that made a defendant eligible for a capital sentence. *Hurst*, 136 S. Ct. at 624. Such a rule would not serve as good cause for Ybarra's claim based on *Hurst*, nor would it establish actual prejudice.

If *Hurst*'s overruling of *Spaziano* and *Hildwin* creates a new rule, it is not retroactive for the very same reasons this Court found *Ring* was not retroactive in *Colwell*.[8] *See Colwell*, 118 Nev. 821, 59 P.3d at 473. The rule would not be not substantive because it does not prohibit punishment of certain conduct or a certain class of persons based on their status or offense. *Id*. And it would not be a retroactive procedural rule because it merely involved the enforcement of the Sixth

[8] The Supreme Court of the United States also rejected retroactivity of *Ring* in *Schriro v. Summerlin*, 542 U.S. 348 (2004).

Amendment right to trial by jury, not because identity of the fact-finder undermines the reliability of the outcome. *Id*. at 821-22, 59 P.3d at 473. Enforcement of the Sixth Amendment right to trial by jury does not undermine the accuracy of judicial fact-finding. *Id*. ("But we believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial not on a perceived need to enhance accuracy in capital sentencing, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state.") Thus, if *Hurst* creates a new rule, it does not apply retroactively.

Most importantly, regardless of the issue of retroactivity, *Hurst*'s "new" rule prohibiting an advisory sentencing system that makes the judge the ultimate finder of fact with respect to aggravating circumstances has no impact on Ybarra's case. Ybarra was sentenced by a jury that found the State proved multiple statutory aggravating factors beyond a reasonable doubt. 6 AA 1461-62. That is precisely what the Supreme Court said the Sixth Amendment requires in *Hurst*. So, Ybarra's sentence complies with any rule *Hurst* creates. And because Ybarra's sentence complies with the rule *Hurst* arguably creates, there is no prejudice.

d. Even Ybarra's reading of *Hurst* does not create a retroactive rule.

Even if this Court were to read *Hurst* as establishing the rule Ybarra insists it creates, as the Ninth Circuit did, the rule would not be retroactive. It is not substantive or a retroactive procedural rule.

i. Ybarra's reading of *Hurst* does not establish a substantive rule.

Substantive rules are rules "establish[] that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendant because of the status or offense…." *Colwell*, 118 Nev. at 820, 59 P.3d at 472. Ybarra argues that his reading of *Hurst* creates a substantive rule because it would apply to everyone whose mitigating circumstances outweigh the aggravating factors. OB at 46.

Ybarra's definition of a substantive rule overbroadly construes the last part of this Court's definition for a substantive rule; that the classification of the person be based on "their status or offense." The crux of his position is that the rule itself creates classes of persons—those who would prevail under the rule, and those who would not. If that was the rule, every new constitutional rule would be substantive.

But that is not what *Colwell* would define as a substantive rule. A substantive rule, under *Colwell*, is one that is based upon an existing, objective characteristic of the person—i.e. the defendant's status as a juvenile or as someone with intellectual disability—not a classification that is created by the rule itself. Ybarra's reasoning as to why *Hurst* creates a substantive rule is unworkable; it would swallow the presumption of non-retroactivity completely and make every new constitutional rule a substantive rule.

Ybarra's reliance on *Alfaro v. Johnson*, 862 F.3d 1176, 1185 n.5 (9th Cir. 2017), is misplaced and furthers Respondents' point. OB at 47 at n.7. In addition to the fact that the footnote he relies upon is undeniably a dictum because the court expressly declined to decide the issue discussed in the footnote, the explanation in that footnote confuses the definition for a substantive rule with the definition for a watershed procedural rule under *Teague*. Substantive rules focus on the constitutionality of the result, while procedural rules govern the manner in which the result is achieved. In other words, a rule making capital punishment unconstitutional would be a substantive rule, but a rule that governs how to determine whether an individual defendant should receive a capital sentence is procedural. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (noting that procedural rules govern the determination of a defendant's culpability).

Ybarra's reading of *Hurst* does not create a substantive rule.

ii. Ybarra's reading of *Hurst* would not result in a retroactive procedural rule.

Ybarra's reading of *Hurst* would not create a retroactive procedural rule either. This Court applies a procedural rule retroactively "if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." *Colwell*, 118 Nev. at 820, 59 P.3d at 472.

In addition to the Ninth Circuit's rationale rejecting retroactivity of *Hurst*, *Ybarra III*, 869 F.3d at 1033, this Court's and the Supreme Court's repeated recognition that weighing is a moral determination that is not amendable to being considered under a traditional burden of proof standard undermines that fact that the rule Ybarra reads out of *Hurst* demonstrates the unreliability of existing capital sentences in Nevada. *Carr*, 136 S. Ct. at 642; *Lisle*, 131 Nev. at __, 351 P.3d at 730-33; *Nunnery*, 127 Nev. at 772-76, 263 P.3d at 251-53. As the United States Supreme Court has repeatedly noted, what makes a capital sentence reliable is allowing the jury to consider and give effect to mitigating evidence to ensure the defendant receives an individualized sentencing consideration. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). And while the Supreme Court continues to express doubt about whether that moral determination is amenable to review under a burden of proof at all, requiring it to be viewed under a specific burden of proof does not seriously diminish the reliability of existing capital sentences, especially

where the jury already determined that the State proved both guilt of a capital offense and the existence of an aggravating circumstance beyond a reasonable doubt. Ybarra's reading of *Hurst* would not establish a retroactive procedural rule.

C. Ybarra fails to establish good cause and prejudice for his challenge to the "depravity" aggravator.

Ybarra also attempts to challenge the "torture, depravity of mind, or mutilation" aggravator. However, he fails to present viable theories for showing cause and prejudice to overcome his default of this issue. Accordingly, the district court did not err in dismissing his challenge to the depravity aggravator.

1. Ybarra fails to establish good cause.

Hurst says nothing about the constitutionality of an aggravating circumstance. Rather, Ybarra's argument that the depravity aggravator is invalid is based on long-standing precedent decided decades ago. OB 31-33. Thus, Ybarra fails to establish a connection between his argument that the depravity of mind aggravator is invalid, and the Supreme Court's decision in *Hu*rst.

And even assuming there is a connection between *Hurst* and the depravity of mind aggravator, *Hurst* does not establish good cause because it is not retroactive for all the reasons stated above. Accordingly, Ybarra fails to establish good cause for his defaults.

2. Ybarra fails to establish actual prejudice.

Even assuming *Hurst* somehow establishes cause for Ybarra to challenge the depravity aggravator, he fails to show that he would suffer actual prejudice if the claim is dismissed. Any error resulting from vagueness of the depravity instruction is harmless. And even if the depravity aggravator were stricken, the jury would have still determined that the mitigating circumstances did not outweigh the aggravating circumstance and sentenced Ybarra to death.

a. Any error is harmless under *Chapman*.

The alleged error under *Godfrey* is harmless. The Ninth Circuit already found that Ybarra conceded mutilation at trial. *Ybarra II*, 656 F.3d at 996; *see also* 6 AA 1390 (conceding the State proved mutilation in closing argument). And the Ninth Circuit's description of the evidence of mutilation is supported by overwhelming evidence. *Ybarra II*, 656 F.3d 996.

The men that discovered Nancy described her horrific wounds when they found her, nude and severely burned. 1 AA 0049, 0069. That description included finding skin from one of Nancy's hands, fingernails included, in the middle of the road near where they found her. 1 AA 0054, 0073.

The wounds to Nancy's head and face were so severe that emergency responders who knew Nancy were unable to recognize her. 1 AA 0084-85, 0098, 0109. And the pathologist that conducted the autopsy testified about the severity

of Nancy's wounds, which covered eighty percent of her body and included (1) "heat splits" caused by intense heat, and (2) internal injuries to her lungs from breathing fire and smoke. 1 AA 0198-200, 205-06, 208. Finally, the pathologist opined that Nancy had been doused with an accelerant or flammable fluid[9] and that the burn patterns and damage to her lungs indicated that she was either seated or standing at the time she was burned. 1 AA 208-10.

Ybarra's concession on the issue of mutilation combined with the overwhelming evidence of mutilation renders the alleged error harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 16-17 (1999). As the Ninth Circuit indicated, a harmless error analysis in this context would only require Respondents to show that the jury would have found the aggravator if the trial court had given a proper limiting instruction. *Ybarra II*, 656 F.3d at 996. But Respondents can take that showing one step further; with Ybarra conceding the issue of mutilation in the face of overwhelming evidence proving the aggravator, there is no reason to believe the jury did not actually find the State proved mutilation beyond a reasonable doubt, which is adequate to satisfy the Eighth Amendment. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988). And Ybarra's reliance on *Stromberg v. California*, 283 U.S. 359, 368 (1931), and *Yates v. United States*, 354 U.S. 298, 312 (1957), to suggest this Court cannot make such

[9] A gas can with Ybarra's finger-print was found near Nancy. 2 AA 0262-64, 439-40.

a determination due to the absence of a special verdict form is entirely misplaced. The Supreme Court of the United States already rejected the Ninth Circuit's reliance on those cases to support the very sort of argument Ybarra makes here in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008).

The error is harmless, which means Ybarra fails to show actual prejudice to overcome his default.

b. Even if the aggravator is stricken, the jury still would have sentenced Ybarra to death.

The weighing analysis conducted under Nevada's capital sentencing scheme is not a fact-finding function that is susceptible to being measured by a burden of proof; it is a moral judgment designed to protect a defendant's right to an individualized sentencing determination. *Lisle*, 351 P.3d at 730-33; *Nunnery*, 263 P.3d at 251 (acknowledging that weighing of mitigating and aggravating circumstances is not fact-finding that implicates Ring). The Supreme Court of the United States recognized this point when it sanctioned the process of appellate courts reweighing after striking an aggravating circumstance in *Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990). Because *Hurst* does not displace this Court's and the United States Supreme Court's understanding on the role of weighing in capital sentencing, this Court should soundly reject Ybarra's argument that *Hurst* overrules, and precludes reweighing under, *Clemons*.

Thus, even assuming this Court does not find the error to be harmless under *Chapman*, it may still reweigh the evidence the remaining evidence. The jury found that the State proved three other aggravating circumstances beyond a reasonable doubt: (1) that Ybarra had been "previously convicted of a felony involving he use or threat of violence to the person of another"; (2) that "[t]he murder was committed while the defendant was engaged in the commission of forcible Rape (Sexual Assault)"; and (3) that the murder was committed while the defendant was engaged in the commission of Kidnapping in the First Degree. 6 AA 1461. Ybarra was convicted of both sexual assault and first-degree kidnapping in the guilt phase of the trial. 6 AA 1292-95. And during the penalty phase of the trial, the State presented evidence of a prior conviction for aggravated assault during the penalty phase and requested that the jury be permitted to consider all of the evidence admitted in the guilt phase of the trial without objection from the defense. 6 AA 1315-16.

In mitigation, Ybarra offered testimony from a pastor that Ybarra met in the jail and from his mother. 6 AA 1316-28. Defense counsel also argued that Ybarra had an absence of a significant criminal history. 6 AA 1387. Additionally, defense counsel asked the jury to consider testimony of Ybarra's family, 6 AA 1389-90, and the testimony of various mental health professionals, 6 AA 1392-93. And he sought to convince the jury that Ybarra's age and lack of intelligence are a

mitigating circumstance. 6 AA 1394-96. Finally, defense counsel concluded the case for mitigation by arguing that Ybarra lacked the capacity "to appreciate the criminality of his conduct or conform his conduct to the requirements of the law" because he was intoxicated. 6 AA 1396-97.

However, none of those circumstances outweigh the fact that Robert Ybarra, Jr. kidnapped and raped sixteen-year-old Nancy Griffith before leaving her in the desert to die. And when considered with the remaining evidence at trial, the jury still would have sentenced Ybarra to death in the absence of the depravity aggravator.

D. Ybarra has not established a fundamental miscarriage of justice.

Ybarra seeks to establish that denial of his petition would result in a fundamental miscarriage of justice. OB at 55-58. To make such a showing, Ybarra must show that he is factually innocent. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 519. He fails to make that showing.

First, Ybarra has not shown that the torture, mutilation, and depravity of mind aggravator does not apply to him; he conceded at trial that it does. Thus, Ybarra's suggestion that the aggravator does not apply to him fails. Additionally, removing the aggravator, this Court the remaining aggravators still outweigh any mitigating circumstances, and the jury still would have sentenced Ybarra to death for the murder of Nancy Griffith in the absence of the depravity aggravator.

V. CONCLUSION

Ybarra has not shown that the district court erred in procedurally defaulting his petition. There is no dispute that the petition is untimely and successive, and the district court did not err in concluding that Ybarra's reliance on *Hurst* does not establish good cause and prejudice to overcome the default. Furthermore, Ybarra fails to establish that dismissal of his petition would result in a fundamental miscarriage of justice. Accordingly, this Court should affirm the judgment of the district court.

RESPECTFULLY SUBMITTED this 16th day of January, 2017

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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2. I further certify that this petition complies with the page or type-volume limitations of NRAP 43(a)(7): This answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,569 words.

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

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RESPECTFULLY SUBMITTED this 16th day of January, 2018.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 16th day of January, 2018, I served a copy of the foregoing **RESPONDENTS' ANSWERING BRIEF**, by electronic filing to

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