No. 73431

IN THE NEVADA SUPREME COURT

William Witter,
Petitioner-Appellant,
v.
State of Nevada,
Respondents-Appellees.

On Appeal from the Findings of Fact, Conclusions of Law and Order
Eighth Judicial District, Clark County
Honorable Stefany Miley, District Court Judge
(Death Penalty Case)

Petitioner-Appellant's Opening Brief

RENE VALLADARES
Federal Public Defender,
District of Nevada
*DAVID ANTHONY
Nevada State Bar 7978
David_Anthony@fd.org
*STACY NEWMAN
Nevada State Bar 14245
Stacy_Newman@fd.org
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
*Counsel for Mr. Witter

William Witter,
Petitioner-Appellant,

v.

State of Nevada,
Respondents-Appellees.

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. The Clark County Public Defender's Office represented Mr. Witter at trial and on appeal.
2. David M. Schieck, Attorney at Law, represented Mr. Witter throughout his first state postconviction proceeding.

/ / /

/ / /

/ / /

3. The Federal Public Defender for the District of Nevada has represented Mr. Witter during all subsequent proceedings.

Dated this 7th day of April, 2020.

RENE L. VALLADARES
Federal Public Defender

s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

s/ Stacy Newman
STACY NEWMAN
Assistant Federal Public Defender

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

STATE STATUTES AND RULES

JURISDICTIONAL STATEMENT

This is an appeal from a final order denying William Witter's petition for writ of habeas corpus filed January 11, 2017. AA137. The district court filed the Notice of Entry of Findings of Fact, Conclusions of Law and Order on June 5, 2017. AA142. Mr. Witter timely filed a notice of appeal on July 10, 2017. AA143.

This Court has appellate jurisdiction under NRS 34.575(1), 34.830, 177.015(1)(b) & 177.015(3).

ROUTING STATEMENT

Under NRAP 17(a)(1), this case shall be heard by the Nevada Supreme Court because it is a death penalty case.

STATEMENT OF THE ISSUES

1) Did the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), invalidate Nevada's capital sentencing scheme regarding this Court's practice of striking aggravating circumstances and reweighing the remaining sentencing evidence on appeal?

2) Did the United States Supreme Court's decision in *Hurst* invalidate Nevada's capital sentencing scheme regarding 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?

STATEMENT OF THE CASE

On July 13, 1995, a jury sentenced William Witter to death after finding him guilty of murder, first-degree murder with a deadly weapon, attempted murder with a deadly weapon, attempted sexual assault with a deadly weapon, and burglary. *See* AA019. This Court affirmed Mr. Witter's convictions and death sentence on direct appeal. *See Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996).

Mr. Witter timely sought postconviction relief, and this Court affirmed the denial of Witter's first state post-conviction petition on August 10, 2001. *See Witter v. State*, 117 Nev. 1192, 105 P.2d 826 (2001) (table). Mr. Witter later filed a second state postconviction petition, the denial of which this Court affirmed on October 20, 2009. *See Witter v. State*, 281 P.3d 1232 (2009) (table). Mr. Witter filed a third state postconviction petition, the denial of which this Court affirmed on November 17, 2010. *See Witter v. State*, 126 Nev. 770, 367 P.3d 836 (2010) (table).

Mr. Witter filed his fourth state postconviction petition, which is the subject of this appeal, on January 11, 2017. AA022. The State responded and moved to dismiss the petition. AA041. Mr. Witter filed an opposition to the State's motion to dismiss, AA068, and the State replied. AA114. Following a hearing, AA122, the district court entered its Findings of Fact, Conclusions of Law and Order denying the petition. AA137. Notice of the Entry of the order was filed June 5, 2017. AA142. Witter timely appealed to this Court on July 10, 2017. AA143.

STATEMENT OF FACTS

Mr. Witter was convicted by a jury of first-degree murder with a deadly weapon, attempted murder with a deadly weapon, attempted sexual assault with a deadly weapon, and burglary. AA060–61. Following these convictions, Mr. Witter's jury was instructed to determine: "(a) Whether an aggravating circumstance or circumstances were found to exist; and (b) Whether a mitigating circumstance or circumstances are found to exist; and (c) Based upon these findings, whether a defendant should be sentenced to life imprisonment or death." AA008. The jury was instructed it could impose a sentence of death only "if it finds at least one aggravating circumstance has been

established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." *Id.* The jury was not instructed as to the burden of proof required to make the outweighing decision, or whether that decision must be made beyond a reasonable doubt.

Mr. Witter's jury found four aggravating circumstances: the murder was committed by a person previously convicted of a violent felony, while the person was engaged in burglary, while the person was engaged in sexual assault, and to avoid or prevent a lawful arrest. AA019–20. The jury determined no mitigating circumstances outweighed the aggravating circumstances and Mr. Witter should be sentenced to death. AA021.

On direct appeal, this Court struck one of the four statutory aggravating circumstances, that Mr. Witter killed to prevent lawful arrest, determining that the State failed to present sufficient evidence to support such a jury finding beyond a reasonable doubt. *Witter*, 112 Nev. at 928–29, 921 P.2d at 900. This Court determined that even without this aggravating circumstance, "the remaining four [sic] aggravators clearly outweigh the mitigating evidence presented by

Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator amounts to harmless error." *Id.* at 930, 921 P.2d at 900–01.[1] This Court then conducted its mandatory statutory review of Mr. Witter's death sentence and found that the evidence supported the remaining three aggravating circumstances, that the sentence of death was not the product of passion, prejudice, or an arbitrary factor, and that the sentence was not excessive, given the crime and Mr. Witter's character. *Id.* at 930, 921 P.2d at 901.

After Mr. Witter filed a second state postconviction petition, this Court struck two more aggravating circumstances under *McConnell v. State*, 121 Nev. 25, 107 P.3d 1287 (2005). *See Witter*, 281 P.3d at *2. This Court again undertook appellate reweighing and concluded that the sole remaining aggravator was "compelling," that Mr. Witter's mitigating evidence was "not particularly compelling," and that "beyond a reasonable doubt [the] jury would have selected the death penalty." *Id.* at *3.

---

[1] This holding was clearly erroneous—after striking one of Mr. Witter's four aggravators, only three remained, not four. *See* AA019–20.

In 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). Within a year of that decision, Mr. Witter filed a state postconviction petition raising two issues related to *Hurst*: 1) *Hurst* invalidated this Court's practice of appellate reweighing following the striking of aggravating circumstances, and 2) the outweighing decision is a prerequisite for imposing a death sentence and therefore must be decided by a jury beyond a reasonable doubt.

Following briefing on the merits and a hearing, the district court denied Mr. Witter's petition. AA137. The court held that although Mr. Witter's petition was timely because his last judgment of conviction was not a final judgment, the petition nevertheless failed on the merits. AA138. The court reasoned that because a jury handed down Mr. Witter's death sentence, Mr. Witter's capital sentencing proceedings did not violate United States Supreme Court precedent. *Id.* The court also reasoned that *Hurst* does not mandate that the outweighing decision be done beyond a reasonable doubt. *Id.* Finally, the court concluded that "neither appellate reweighing nor the weighing process implicate *Hurst*." *Id.*

SUMMARY OF THE ARGUMENT

The Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), established a new rule of constitutional law that renders Mr. Witter'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 three aggravating circumstances, this Court reweighed the remaining aggravating circumstance and the mitigating evidence. Although not addressed by the district court, *Hurst* applies retroactively on collateral review. The district court erred by denying relief. This Court should therefore remand Mr. Witter's case for a new sentencing proceeding where 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.

ARGUMENT

This Court's review of the district court's order is de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008) (holding that questions of constitutional law such as these are reviewed de novo).

As a threshold manner, Mr. Witter acknowledges that this Court rejected arguments that *Hurst* constitutes good cause to overcome state procedural bars. *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019). Although in Mr. Witter's case, he did not lose his petition based on the application of procedural bars, AA138, Mr. Witter recognizes the *Castillo* opinion was based on an assessment of the underlying merits of the petitioner's *Hurst* claims. However, for the reasons below, Mr. Witter requests this Court reconsider its decision in *Castillo*.

Following a discussion of *Castillo*, Mr. Witter will demonstrate that *Hurst* both invalidates appellate reweighing and 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.

Last, Mr. Witter will show that *Hurst* is a watershed decision that should be applied retroactively to cases, like his, on collateral review.

A. Mr. Witter respectfully requests this Court reconsider its decision in *Castillo*.

This Court should reconsider its decision in *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), *petition for cert. filed* Feb. 3, 2020 (Case No. 19-7647), for two reasons.

First, *Castillo* represents a sharp divergence from Nevada statutes and the Court's own precedent, without adequate explanation or justification. For over three decades, this Court's opinions were aligned with the plain language of the statutory capital-sentencing scheme. *Compare* NRS 175.554, *and* 200.030(4)(a), *with, e.g.*, *McConnell v. State*, 121 Nev. 25, 33, 107 P.3d 1287, 1292 (2005), *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001), *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), *Middleton v. State*, 114 Nev. 1089, 1116–117, 968 P.2d 296, 314–15 (1998), *and Ybarra v. State*, 100 Nev. 167, 176, 679 P.2d 797, 802 (1984). In 2015, this Court departed from its precedent and the plain language of the statutes. *See Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). And in *Castillo*, this Court completed its departure, with far-reaching—but unacknowledged—implications. This disregard of stare decisis without "compelling reasons for so doing," *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008); *see State v. Harte*, 124 Nev. 969, 977–78, 194 P.3d 1263, 1268 (2008) (Hardesty, J., concurring), was improper and this Court has usurped the power of the Nevada legislature by

rewriting the plain language of the capital sentencing scheme. Reconsideration of this Court's decision is therefore required.

Second, this Court's decision in *Castillo* conflicts with United States Supreme Court precedent. This Court's new formulation of the capital sentencing scheme requires the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, to use the outweighing determination to "walk-back" a death-eligibility finding to a life sentence. *See Castillo*, 442 P.3d at 561.

The United States Supreme Court has twice criticized statutory schemes like this Court's reformulation of Nevada's scheme. The Court first considered in *Andres v. United States* the interpretation of a statute that required jurors to "walk back" a sentence of death to a sentence of life. 333 U.S. 740 (1948). The Court rejected a construction of the statute "whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* at 748. Instead, the Court explained, the jury must decide unanimously on guilt and then decide unanimously between life imprisonment and death. *Id.* Next, in *Mullaney v. Wilbur*, the High Court considered a Maryland statute that

required a defendant prove he acted "'in the heat of passion on sudden provocation' in order to reduce . . . homicide to manslaughter," *i.e.*, to "walk back" a homicide to manslaughter by proving an affirmative defense. 421 U.S. 684, 684–85 (1975). The Court addressed two aspects of the Maryland statute: (1) the defendant had to prove heat of passion, and (2) the statute did not require proof beyond a reasonable doubt. *Id.* at 696–701. Because the absence of heat of passion significantly increased the defendant's potential sentence, the Court concluded that both aspects of the Maryland statute violated due process. *Id.* "This is an intolerable result," the Court explained, "in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703–04.

In combination, *Andres* and *Mullaney* show that interpreting Nevada's death-penalty statutes as this Court did in *Castillo* violates Mr. Witter's constitutional right to due process and a jury verdict. The outweighing determination is a prerequisite to the jury considering a death sentence. *See Lisle*, 131 Nev. at 365, 351 P.3d at 732. And it violates the Due Process Clause and the Eighth Amendment to make

this requirement an afterthought for the jury, used only to lessen a death sentence to life imprisonment. *See Mullaney*, 421 U.S. at 703–04.[2] Thus, this Court should reconsider its erroneous holding that Nevada capital defendants become death-eligible at the first stage in the sentencing determination, then can become non-death-eligible at the second stage.

B. *Hurst* rendered both Mr. Witter's death sentence and appellate reweighing unconstitutional.

Nevada law has long provided 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, e.g., Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); 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

[2] Allowing the jurors, as an act of mercy, to walk back a death sentence to life imprisonment also lessens their sense of personal responsibility, in violation of the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

circumstances found.") (emphasis added); 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 the penalty phase of Mr. Witter's trial, under NRS 175.554 (4) and 200.030 (4)(a), the trial court instructed the jury that the State had to prove the existence of each aggravating factor beyond a reasonable doubt. AA008. 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. Under the rule established in *Hurst*, Mr. Witter's constitutional rights were violated during the jury's outweighing determination. Similarly, Mr. Witter's rights were violated when this Court usurped the province of the jury by reweighing Mr. Witter's sole aggravating circumstance against his mitigating evidence.

1. *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 determinations. First, the jury must find the existence of "at least one aggravating circumstance"; and second, it must further "find" 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."). Only after a jury finds a defendant death eligible does the jury make the third determination: 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 Castillo*, 135 Nev. at 129–30, 442 P.3d at 560–61; *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). But *Hurst* demonstrates 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 v. New Jersey*, 530 U.S. 466, 490 (2000). Because under Nevada law the outweighing determination is part of the eligibility phase, it is an "element" as defined by *Hurst*.[3]

Mr. Witter's jury was instructed that it could impose a death sentence if it found "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." AA008. 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 this beyond a reasonable doubt. This is structural error. *See Sullivan v. Louisiana*, 508 U.S. 275, 280–82 (1993) (concluding that trial court's failure to properly instruct jury regarding prosecution's

[3] Again, Mr. Witter recognizes this Court held to the contrary in *Castillo v. State*, 135 Nev. 126, 130, 442 P.3d 558, 561 (2019). However, as explained above, Mr. Witter respectfully asks this Court to revisit its decision in *Castillo*.

burden of proof was a structural error that required reversal). Mr. Witter's sentence must be vacated.

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—""weighing states"—could nevertheless affirm a death sentence founded, in part, on an invalid aggravating circumstance. 494 U.S. 738, 741, 745 (1990). The Court sanctioned two approaches: (1) the appellate court could independently review the evidence in aggravation and mitigation and affirm if the court concluded that the death sentence was factually supported; or (2) the court could review for harmless error. *Id.* at 741. The first of these approaches, 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. When 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 Supreme Court generally approved of judicial factfinding in capital sentencing. This conclusion, substantially undermined in *Ring v. Arizona*, 546 U.S. 584 (2002), 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*.").

The United States Supreme Court recently addressed *Clemons* in *McKinney v. Arizona*, 140 S. Ct. 702 (2020). *McKinney* concluded that *Clemons* remained good law in Arizona for a petitioner whose conviction was final before *Ring*. *McKinney*, 140 S. Ct. at 707–08. But *McKinney* also explained that the issue it was deciding was "narrow," *id.* at 706—it involved a unique procedure in a state, Arizona, with a different capital sentencing scheme. *Id.* at 706. Importantly, Arizona does not have Nevada's three-step capital sentencing statute. *See* Ariz. Rev. Stat. § 13-752. In addition, until *Ring*, trial judges in Arizona, not juries, decided whether aggravating circumstances existed and death was warranted. *See McKinney*, 140 S. Ct. at 706. Thus, the holding that appellate judges in Arizona could perform the weighing step is law for Arizona, but nonbinding dicta for states like Nevada (particularly after *Ring*). *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,

551 U.S. 701, 737 (2007); *cf. Valerio v. Crawford*, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (distinguishing between appellate factfinding when original factfinder was judge versus when original factfinder was jury). Just as appellate judges can no longer find the existence of an aggravating factor in Arizona, because that is the role of juries post-*Ring*, appellate judges in Nevada cannot perform either prerequisite for consideration of the death penalty in Nevada, *i.e.*, the finding of aggravators or outweighing.

Just as it violates the Sixth Amendment for a judge to independently weigh aggravating and mitigating circumstances, it also clearly violates 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. 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 in the district court.

The second approach sanctioned in *Clemons*, however, was not affected by *Hurst* in the same way as appellate reweighing; as the Supreme Court has recognized, appellate courts may analyze the majority of constitutional errors for harmless error. *See Chapman v. California*, 386 U.S. 18, 22–24 (1967). The harmless error standard, however, imposes a heavy burden on the State. When a capital sentencing jury has considered an improper aggravating factor, an appellate court may affirm only if the State "prove[s] beyond a reasonable doubt that the error … did not contribute to the verdict obtained." *Id.* at 24; *see Neder v. United States*, 527 U.S. 1, 19 (1999) (explaining that if, after a "thorough examination of the record," the reviewing "court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error, . . . it should not find the error harmless").

This analysis is substantially different from appellate reweighing, where the court performs independent fact-finding regarding the relative weight of aggravating and mitigating circumstances. *Compare Neder*, 527 U.S. at 19 (explaining that court reviewing for harmless error does not "become in effect a second jury" (internal quotation

marks omitted)), *with Pertgen v. State*, 110 Nev. 554, 563, 875 P.2d 361, 366 (1994) ("Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances."), *abrogated on other grounds by Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001).

This Court's review for harmless error may still be valid—so long as the jury during the penalty phase was correctly instructed on the standard of proof. The problem, however, lies with this Court's conflation of harmless error review and the reweighing analysis. *See, e.g.*, *State v. Haberstroh*, 69 P.3d 676, 682–83 (Nev. 2003). The hybrid method confuses the two standards, involves independent judicial factfinding on a standard less than beyond a reasonable doubt, and violates the Sixth Amendment and Due Process Clause. Though this Court regularly refers to harmless error analysis, its practice of examining penalty phase records reveals that judicial fact-finding often determines whether the courts will affirm or reverse a death sentence.

Mr. Witter's case demonstrates this point. Following *Clemons*, this Court began performing separate reweighing analyses and harmless error reviews whenever an aggravating factor was determined to be

invalid, and did so in Mr. Witter's case on direct appeal. *See Witter v. State*, 112 Nev. at 929–30, 921 P.2d at 900–01. This Court's decision rejecting Mr. Witter's direct appeal followed its practice of intermixing reweighing and harmless error language:

> Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain four aggravators that the State has proven beyond a reasonable doubt. In mitigation, Witter offered the testimony of several members of his family and the testimony of a clinical psychologist, all of whom testified that Witter grew up in a very abusive and dysfunctional family. *We conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator amounts to harmless error. See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We therefore conclude that even though the district court erred in allowing the prevention of lawful arrest aggravator to be considered by the jury, Witter's sentence of death is still proper.

Id. (emphasis added).

This Court again mixed the two forms of review in its 2009 decision after striking two more aggravating circumstances in Mr. Witter's case:

> This court must therefore decide whether it is clear beyond a reasonable doubt both that the jury would have found Witter death eligible and that the jury would have selected the death penalty absent the erroneous aggravating circumstances. If the court cannot make both determinations, then a new penalty hearing is required. *See Hernandez v. State*, 124 Nev., 194 P.3d 1235, 1240–41 (2008); *Bejarano*, 122 Nev. at 1081–82, 146 P.3d at 276; *Leslie v. Warden*, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Witter, 281 P.3d at *2.

After reciting the "beyond a reasonable doubt" standard, this Court then set forth the circumstances of the remaining aggravator, which was based on a 1986 conviction for assault with a deadly weapon resulting in great bodily injury. *Id.* at 2. Next, this Court set forth the mitigating evidence from Mr. Witter's trial, such as the history of substance abuse in his family, the dysfunction in his family, physical abuse he suffered as a child, Mr. Witter's own struggles with substance abuse, Mr. Witter's low-average IQ, and the sexual abuse Mr. Witter suffered. *Id.* Finally, this Court set forth its blended conclusion, which weighed the remaining aggravating circumstance with what it considered Mr. Witter's mitigating evidence:

We conclude beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances. The remaining aggravator is compelling and involved a violent attack in which Witter stabbed the victim with a seven-inch butcher knife and cut the victim's bowels in ten places, almost killing him. On the other hand, the mitigating circumstances—that Witter: (1) was under the influence of an extreme mental or emotional disturbance, (2) came from a dysfunctional family with alcohol and substance abuse and psychological issues, (3) had below average intelligence, (4) had possible Attention Deficit Hyperactivity Disorder, (5) had possible Antisocial Personality Disorder, and (6) had possible Developmental Arithmetic Disorder—are not particularly compelling.[3]

We further conclude beyond a reasonable doubt that the jury would have selected the death penalty. Evidence was presented of Witter's numerous misdemeanor convictions for being drunk in public, resisting arrest, vandalism, disturbing the peace, DUI, and hit and run, as well as his arrests for arson, resisting arrest, fighting, drunk driving, burglary, vandalism, and various drug offenses. Evidence was also presented that Witter had been incarcerated as a juvenile for rape. In addition, the State presented evidence that Witter was affiliated with a gang, had committed acts of domestic violence, and that while in jail he had been found with a shank. In conjunction with the victim impact testimony of James Cox's family, including the testimony of his widow who had personally witnessed and survived the attack, we conclude that it is beyond

> a reasonable doubt that the jury would have selected the death penalty.

Id. at *3.

Footnote 3 addressed Mr. Witter's argument this Court would be reweighing without sufficient guidance from a jury:

> Witter argues that because the jury that sentenced him to death did not use a special verdict form, there is no way of knowing which mitigators the jury considered and therefore reweighing is improper because it would involve fact-finding. Witter's claim is without merit. The district court considered every mitigating circumstance for which Witter offered evidence at trial, and we have done the same.

Id. at *3, fn. 3.

This Court's 1996 and 2009 reweighing analysis demonstrates the harm of appellate reweighing for two reasons.

First, in its 1996 decision, this Court conducted its reweighing analysis under a clearly mistaken—but critical—belief. This Court erroneously believed that even after it struck one aggravator, Mr. Witter was still subject to four valid aggravators. *See Witter*, 112 Nev. at 930, 921 P.2d at 900 ("Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain

four aggravators that the State has proven beyond a reasonable doubt."). But Mr. Witter's jury only found four aggravating circumstances. *See* AA019–20. Thus, after this Court struck one of them, Mr. Witter was left with only three valid aggravating circumstances—not four. Had a jury performed the sentencing, they would have only considered three valid aggravating circumstances, not four. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (this Court presumes jurors follow instructions received at a capital penalty proceeding). Thus, there is a reasonable possibility that a jury may have sentenced him to less than death.

Second, this Court's 2009 decision shows it considered different mitigating evidence at different points of its analysis; at one point, this Court appeared to consider sexual abuse as mitigating evidence, but it does not list it as mitigating evidence in its final analysis. *Compare id.* at *2 *with id.* at *3. Similarly, in the Court's 1996 decision, this Court mentioned none of the mitigating evidence it later deemed mitigating in 2009; for example, the 1996 decision merely mentions evidence that "Witter grew up in a very abusive and dysfunctional family," whereas the 2009 decision lists that at the time of the crime, Mr. Witter was

under the influence of an extreme mental or emotional disturbance and had preexisting psychiatric disorders. *Compare Witter*, 112 Nev. at 929–30, 921 P.2d at 900–01, *with Witter*, 281 P.3d at *3. Further, it is unclear how Mr. Witter's troubled childhood—which is in this Court's 1996 decision as mitigating—squares with the mention of Mr. Witter's juvenile criminal record—which is mentioned as aggravating in this Court's 2009 decision. *Compare Witter*, 112 Nev. at 929–30, 921 P.2d at 900–01 *with Witter*, 281 P.3d at *3.

These divergences in what this Court considered mitigating in Mr. Witter's case demonstrates the danger of appellate reweighing—it is unlikely that any appellate court, on a cold record, could replicate the dynamics of a jury of Mr. Witter's peers considering *all* of his mitigation evidence against his lone valid aggravator. Moreover, under federal constitutional law, a juror cannot be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Thus, the danger that an appellate court will overlook some evidence that a juror may have found mitigating is constitutionally

intolerable, and the practice usurps from the jury the most important decision a jury can make. That is precisely what happened in Mr. Witter's case.

Hurst demonstrates appellate reweighing violates the Sixth Amendment and Due Process Clause, and this Court should reverse the district court's decision and remand for a new penalty hearing where a jury of Mr. Witter's peers can decide whether he deserves a death sentence.

3. *Hurst* applies retroactively on collateral review.

The district court did not decide whether *Hurst* applied retroactively. *See* AA138. However, Mr. Witter argued below that it should. *See* AA103–11. To provide this Court will all the information it needs, Mr. Witter provides a retroactivity analysis below.

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").

4. *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 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 v. State*, 122 Nev. 1066, 1075, 146 P.3d 265, 271 (2006) ("[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 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.[4]

5. 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*, 153 A.3d at 75–76 (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 Supreme Court, along with this Court and lower federal courts, has long recognized that the beyond-a-reasonable-

[4] By focusing on the necessity of applying *Hurst* retroactively under the *Colwell* standard, Mr. Witter does not imply or concede that retroactivity is not also required under the federal standard. The same factors discussed with respect to *Colwell*, below—the balancing effect of the beyond-a-reasonable-doubt burden of proof, the status of the standard of proof as a "watershed" rule, and the effect of the standard of proof as a substantive rule—all apply with equal force to the federal standard. *See Powell v. State*, 153 A.3d 69, 72-76 (Del. 2016) (finding *Hurst* retroactive under Federal standard); *see also Montgomery v. Louisana*, 136 S. Ct. 718, 732-35 (2016); *Alfaro v. Johnson*, 862 F.3d 1176, 1185 n.5 (9th Cir. 2017). This Court could rely upon either standard to find that *Hurst* must be applied retroactively.

doubt standard of proof "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970); *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 two cases the Supreme Court has 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 upheld the truth-finding function of criminal trials and diminished the probability that an innocent person would be convicted. *See 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.").

This accuracy-increasing function distinguishes Mr. Witter's situation from that discussed in *Summerlin v. Schriro*, 542 U.S. 348 (2004), the 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" accuracy enhancing 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).

Mr. Witter's constitutional claims, on the other hand, concern not just 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, applying 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. The 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 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 v. United States*, 570 U.S. 99 (2013)—was based on 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, 668–71 (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 if 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.

6. 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 the 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 . . .).[5]

[5] 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).

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

7. *Ybarra v. Filson* does not change Mr. Witter's argument that *Hurst* applies retroactively in Nevada.

In *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017), the Ninth Circuit denied a petitioner 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). To file a second or successive petition, a petitioner must 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, in any event, *Ybarra* does not affect Mr. Witter's claim because *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. at 718, and *Welch*, 136 S. Ct. at 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).

CONCLUSION

The Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), established a new rule of constitutional law that renders Mr. Witter's death sentence unconstitutional because: (1) the trial court did not instruct the jury it had to find the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt; and (2) because, after striking three aggravating circumstances, this Court reweighed the remaining aggravating circumstance and the mitigating evidence. The district court erred by denying relief.

/ / /

/ / /

/ / /

Mr. Witter requests this Court vacate his death sentence and remand his case for a new penalty hearing.

Dated this 7th day of April, 2020.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Stacy Newman
STACY NEWMAN
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

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

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

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 8,233 words; or

[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion

in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of April, 2020.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

s/ Stacy Newman
STACY NEWMAN
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of April, 2020, electronic service of the foregoing PETITIONER-APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

Alexander Chen
Chief Deputy District Attorney
Alexander.Chen@clarkcountyda.com

s/ Jeremy Kip
An Employee of the
Federal Public Defender
District of Nevada