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 Appendix

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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 APPENDIX shall be made in accordance with the Master Service List as follows:

Alexander Chen
Chief Deputy District Attorney
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s/ Jeremy Kip
An Employee of the
Federal Public Defender
District of Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

CASE NO. C117513

DEPT. NO. IX

DOCKET NO. W

FILED IN OPEN COURT
JUL 13 1995 1966 p.m.
LORETTA BOWMAN, CLERK
BY Bernice Stucki
Deputy

INSTRUCTIONS TO THE JURY

(INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

INSTRUCTION NO. 3

In your deliberation you may not discuss or consider the subject of guilt or innocence of a defendant, as that issue has already been decided. Your duty is confined to a determination of the punishment to be imposed.

INSTRUCTION NO. 4

The trial jury shall fix the punishment for every person convicted of murder of the first degree.

INSTRUCTION NO. 5

The jury shall fix the punishment at:

(1) Life imprisonment without the possibility of parole,

(2) Life imprisonment with the possibility of parole, or

(3) Death.

INSTRUCTION NO. 6

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant would be eligible for parole after a period of twenty years. This does not mean that he would be paroled after twenty years, but only that he would be eligible after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.

If you sentence the Defendant to death, you must assume that the sentence will be carried out.

Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, it does not have the power to commute a sentence of life imprisonment without the possibility of parole to a sentence that would allow parole.

INSTRUCTION NO. 1

In the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, and any other evidence that bears on the defendant's character.

Hearsay is admissible in a penalty hearing.

INSTRUCTION NO. 8

The State has alleged that aggravating circumstances are present in this case.

The defendants have alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are 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.

The jury may 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 circumstances or circumstance found.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

You are instructed that it is not necessary for the defendant to present any mitigating circumstances. Even if the State establishes one or more aggravating circumstances beyond a reasonable doubt and the defendant presents no evidence in mitigation you should not automatically sentence the defendant to death. The law never specifies that a sentence of death is appropriate; the jury however may consider the option of sentencing the defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance or circumstances

exists and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

INSTRUCTION NO. 9

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

INSTRUCTION NO. 10

You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

INSTRUCTION NO. 11

Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

(1) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(2) The defendant acted under duress or under the domination of another person.

(3) The youth of the defendant at the time of the crime.

(4) Any other mitigating circumstances.

INSTRUCTION NO. 12

Mitigating circumstances are those factors which, while they do not constitute a legal justification or excuse for the commission of the offense in question, may be considered, in the estimation of the jury, in fairness and mercy, as extenuating or reducing the degree of the defendant's moral culpability.

You must consider any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffer as a basis for a sentence less than death.

INSTRUCTION NO. 13

It is a constitutional right of a defendant in a criminal matter that he may not be compelled to testify. You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberation in any way.

INSTRUCTION NO. 14

The jury is instructed that in determining the appropriate penalty to be imposed in this case for First Degree Murder that it may consider all evidence introduced and instructions given at both the penalty hearing phase of these proceedings and at the trial of this matter.

You are further instructed that the Court will determine the appropriate penalty for the crimes of Attempt Murder With Use Of A Deadly Weapon, Attempt Sexual Assault With Use Of A Deadly Weapon and Burglary.

INSTRUCTION NO. 15

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. When you have agreed upon your verdicts, they should be signed and dated by your foreman.

INSTRUCTION NO. 16

The Court has submitted two sets of verdicts to you. One set of verdicts reflects the three possible punishments which may be imposed. The other verdict is a special verdict. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance and any mitigating circumstances.

INSTRUCTION NO. 17

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law was given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

GIVEN BY:

Stephen Huffaker

District Judge

JUL 13 1995

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THE STATE OF NEVADA

FILED IN OPEN COURT
JUL 13 1995 6:00 p.m.
LORETTA BOWMAN, CLERK
BY Bernice Stucki, Deputy

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM LESTER WITTER, #1204227 Defendant.	CASE NO. C117513 DEPT. NO. IX DOCKET NO. W

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM LESTER WITTER, Guilty of COUNT I - MURDER OF THE FIRST DEGREE, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

✓ The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

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✓ The murder was committed while the person was engaged in the commission of or an attempt to commit any Sexual Assault.

✓ The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

DATED at Las Vegas, Nevada, this 13 day of July, 1995

Nohr a. Flem
FOREPERSON

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
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Attorney for Plaintiff
THE STATE OF NEVADA

FILED IN OPEN COURT
JUL 13 1995 @ 6:00 p.m.
LORETTA BOWMAN, CLERK
BY Bernice Stucke
Deputy

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM LESTER WITTER, #1204227 Defendant.	CASE NO.	C117513
	DEPT. NO.	IX
	DOCKET NO.	W

VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM LESTER WITTER, Guilty of COUNT I - MURDER OF THE FIRST DEGREE and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

_____ Life in Nevada State Prison With the Possibility of Parole.

_____ Life in Nevada State Prison Without the Possibility of Parole.

✓ Death.

DATED at Las Vegas, Nevada, this 13 day of July, 1995

Robt a. Sllm.
FOREPERSON

CE31

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Attorneys for Petitioner William Witter

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM WITTER,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison, and ADAM PAUL LAXALT, Attorney General for the State of Nevada.

Respondents.

Case No. C117513
Dept. No. IV

PETITION FOR A WRIT OF HABEAS CORPUS (POST-CONVICTION)

(Death Penalty Habeas Corpus Case)

Petitioner William Witter files this Petition for Writ of Habeas Corpus (Post-Conviction) pursuant to Nevada Revised Statute ("NRS") sections 34.724 and 34.820. Mr. Leonard alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America; Article 1, sections Three, Six, Eight, and Nine, and Article 4, section Twenty-One of the Constitution of the State of Nevada; and the rights afforded to him

under federal law enforced under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI.

DATED this 11th day of January, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Respondent

PLEASE TAKE NOTICE that the "PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)" filed January 11, 2017 will be heard on the 28 day of Feb., at the hour of 11:00am a.m./p.m., in Department IV of the District Court.

DATED this 11th day of January, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

PROCEDURAL ALLEGATIONS

1. Petitioner William Witter is currently in the custody of the State of Nevada at High Desert State Prison in Indian Springs, Nevada, pursuant to a state court judgment of conviction and sentence of death. Witter was convicted by a jury of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary in the Eighth Judicial District Court, Clark County, Case No. C117513. The trial was conducted by the Honorable Stephen Huffaker. Witter pleaded not guilty to the charges. He did not testify at trial.

2. Witter's jury sentenced him to death on the murder count following a penalty hearing in which it found four aggravating circumstances: (1) that the murder was committed by a person who was previously convicted of a felony involving the use or threat of violation to the person of another; (2)-(3) that the murder was committed while the person of was engaged in the commission of or an attempt to commit a burglary and separately, a sexual assault; and (4) that the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

3. An amended judgment of conviction was entered August 11, 1995. The court sentenced Witter to death on the murder count; a term of twenty years on the attempted murder count, plus an equal and consecutive term of twenty years for the use of a deadly weapon in connection with this offense; a term of twenty years on the attempted sexual assault count, plus an equal and consecutive term of twenty years for the use of a deadly weapon in connection with this offense; and a term of ten years

on the burglary count. The terms on the attempted sexual assault charge were to run consecutive to the attempted murder charge. The term on the burglary charge was to run consecutive to the attempted sexual assault charge. Witter was also ordered to pay restitution in the amount of $2,790, "with an additional amount to be determined."

4. Witter timely appealed.[1] On July 22, 1996, Witter's convictions and death sentence were affirmed on direct appeal by the Nevada Supreme Court. Witter

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[1] On direct appeal, Witter raised the following issues:

(1) The trial court committed error by not allowing jury voir dire questioning concerning the potential impact of a prior violent felony conviction;

(2) The trial court committed error by refusing to question prospective jurors concerning exposure to a prejudicial newspaper article published during jury selection;

(3) The trial court committed error by failing to give jury instructions which adequately distinguished the elements of malice aforethought and premeditation / deliberation;

(4) Prosecutorial misconduct in the penalty phase closing arguments deprived Witter of a fair trial;

(5) The trial court committed error in denying Witter's motion for a mistrial based on the victim's penalty hearing to the jury to "show no mercy" to the defendant;

(6) The trial court committed error in denying Witter's motion for continuance to adequately prepare for the penalty hearing;

(7) The trial court committed error by refusing to exclude witnesses who would be called at the penalty phase of trial;

(8) The trial court committed error when it denied Witter's motion to argue last during the penalty phase;

(9) The trial court committed prejudicial error by failing to follow the mandate of Supreme Court Rule 250 regarding the settling of jury instructions.

(10) The trial court committed error in denying Witter's motion to strike the "preventing lawful arrest" aggravating circumstance;

(11) The trial court committed error by allowing introduction of penalty phase evidence that Witter possessed a weapon while in jail; and

(12) The trial court committed error by admitting penalty phase allegations that Witter was affiliated with a street gang.

v. State, 112 Nev. 908, 921 P.2d 886 (1996), cert. denied, 520 U.S. 1217 (1997) [hereinafter "Witter I"]. In the course of its order, the Nevada Supreme Court concluded that there was insufficient evidence to support the jury's finding of the "avoid lawful arrest" aggravating circumstance, see Nev. Rev. Stat. § 200.033(5) (1995), beyond a reasonable doubt. See Witter I, 112 Nev. at 928-30, 921 P.2d at 900-01. It nevertheless upheld Witter's death sentence by finding, inter alia, that "the remaining four [sic] aggravators clearly outweigh the mitigating evidence presented" by Witter at trial. Id. at 930, 921 P.2d at 900.[2]

5. On October 27, 1997, Witter filed his proper person petition for writ of habeas corpus with the Eighth Judicial District Court and sought the appointment of counsel. On August 11, 1998, appointed counsel filed a supplemental brief in support of the petition, setting forth the following claims: (1) Witter's trial counsel was ineffective in myriad ways; and (2) his direct appeal counsel was ineffective in myriad ways. The court held an evidentiary hearing on Witter's petition on February 26, 1999, and denied the petition in an order dated September 25, 2000.

6. The Nevada Supreme Court affirmed the denial of relief in an unpublished order dated August 10, 2001. See Order of Affirmance, Witter v. State, Case No. 36927 (Nev. Aug. 2001).

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[2] The Nevada Supreme Court's analysis contained an obvious error: at the point it determined that the "avoid lawful arrest" aggravator did not apply to Witter's case, there were only three remaining aggravating circumstances.

7. On or about September 4, 2001, Witter filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada and sought the appointment of counsel. See Petition for a Writ of Habeas Corpus, Witter v. McDaniel, Case No. 01-CV-01034 (D. Nev. Sept. 4, 2001). Witter, through appointed counsel, filed an amended petition on November 23, 2005, raising twelve claims.[3] On November 30, 2006, the district court entered an order staying the federal proceedings pending Witter's filing of a second state-court petition.

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[3] Specifically, Witter alleged the following claims:

(1) His conviction and sentence were invalid under Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny;

(2) His conviction and sentence were invalid due to the trial court's refusal to allow Witter's counsel to ascertain the partiality of potential jurors;

(3) His conviction and sentence were invalid due to comments made by the trial court to the jury venire;

(4) His sentence was invalid where the trial court removed potential jurors who were qualified to serve as jurors under federal constitutional law;

(5) His sentence was invalid due to the admission of impermissible victim-impact evidence;

(6) His sentence was invalid due to the state's use of his juvenile convictions as non-statutory aggravating evidence;

(7) His sentence was invalid due to instructional error in the penalty phase of his trial;

(8) His sentence was invalid due to the State's use of the same felony-murder charges both to support his first-degree murder conviction on a felony-murder theory and as an aggravating circumstance;

(9) His sentence was invalid because of prosecutorial misconduct in presenting evidence regarding his alleged gang affiliation;

(10) His sentence was invalid due to the State's obtaining and presenting evidence from his mental-health evaluation;

(11) His trial counsel was ineffective in failing to present evidence in the penalty phase that he suffers from Fetal Alcohol Effect (FAE); and

(12) His trial counsel was ineffective in failing to present additional mitigating evidence at the penalty phase.

8. On February 14, 2007, Witter, through undersigned counsel, filed a petition for post-conviction relief in this Court, raising eighteen claims.[4] He filed a supplement to this petition raising an additional claim on May 29, 2007.[5] This Court denied the petition without an evidentiary hearing in an order dated September 26, 2007. The Nevada Supreme Court affirmed in an unpublished order issued October 20, 2009. Therein, it concluded that another two statutory aggravators – that the murder was committed in the course of a robbery and, separately, a sexual assault – were invalid. See Witter v. State, Case No. 50447, 2009 WL 3571288, at *1 (Nev. Oct. 20, 2009) (unpublished). It nevertheless again upheld Witter's death sentence, concluding "beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances." See id. at *3.

9. While this appeal was pending, Witter on April 28, 2008 filed a separate petition for a writ of habeas corpus in this Court, alleging that his conviction was

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[4] Therein, Witter alleged, albeit in different order, the same twelve claims listed above. He also alleged the following additional claims:

(1) Execution by lethal injection violates the Eighth Amendment;

(2) His conviction and sentence are invalid because the proceedings against him were overseen by elected judges;

(3) His sentence is invalid due to the restrictive conditions on Nevada's death row;

(4) His sentence is invalid due to the risk that the irreparable punishment of execution will be applied to innocent persons;

(5) His sentence is invalid because the Nevada death penalty system operates in an arbitrary and capricious manner.

(6) His sentence is invalid because the death penalty is cruel and unusual punishment; and

(7) His convictions and sentence are invalid due to cumulative error.

[5] In this supplement, Witter alleged that his sentence violated the Eighth Amendment because he suffers from Fetal Alcohol Spectrum Disorder.

invalid under the Ninth Circuit's then-recent decision in Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007). This Court denied the petition without an evidentiary hearing in an order dated November 24, 2008. The Nevada Supreme Court affirmed in an unpublished order issued November 17, 2010. See Witter v. State, Case No. 52964, 2010 WL 4673531 (Nev. Nov. 17, 2010).

10. Following the completion of these proceedings, the federal district court reopened the earlier proceedings and denied Mr. Witter's petition in an order dated August 12, 2014. Witter's appeal of this order is currently pending at the Ninth Circuit Court of Appeals. See Witter v. Baker, Case Nos. 14-99009, 14-99010 (9th Cir.).

11. Witter is not presently serving a sentence for a conviction other than the conviction(s) under attack in this petition.

12. No execution date is scheduled.

STATEMENT WITH RESPECT TO CLAIMS RAISED FOR THE FIRST TIME IN THE INSTANT PETITION

The claims in this petition are not subject to state procedural default rules because they are timely pursuant to Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012) (en banc). In Whitehead, the Nevada Supreme Court reversed the dismissal of a petition for writ of habeas corpus and remanded for consideration of the petitioner's claims on the merits, conluding that "a judgment of conviction that imposes restitution but does not set an amount of restitution, in violation of Nevada statutes, is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for writ of habeas corpus." See id. at __, 285 P.3d at 1054-55 (citing

NRS 176.105(1), 176.033(1)(c)). Then, following the logic of Whitehead, the Nevada Supreme Court concluded that "a judgment of conviction that imposes restitution in an uncertain amount" is not "final" for purposes of review. See Slaate v. State, 129 Nev. __, __ 298 P.3d 1170, 1170-71 (2013) (per curiam). The same logic applies to the instant petition. As noted above, this Court determined that restitution was appropriate in this case, but in its Amended Judgment of Conviction left the final amount of this restitution "to be determined."

In the alternative, Witter presents the claims in this petition because intervening authority from the United States Supreme Court, Hurst v. Florida, 136 S. Ct. 616 (2016), was not available to him in prior state post-conviction proceedings. Witter can demonstrate good cause and prejudice to overcome the state procedural bars when a federal court holds that a prior determination of the state courts is erroneous. See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); accord Evans v. State, 117 Nev. 609, 643, 28 P.3d 498, 521 (2001) (good cause to overcome state procedural default exists when "a federal court concludes that a determination of this court is erroneous").

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PRIOR COUNSEL

The attorneys who previously represented Mr. Witter are:

A. Trial and Sentencing:
Phillip J. Kohn, Clark County Public Defender
Kedric Bassett, Clark County Public Defender

B. Direct Appeal:
Robert L. Miller, Clark County Public Defender

C. First Post-Conviction and Appeal:
David M. Schieck (appointed)

D. Federal Habeas Proceedings:
Federal Public Defender for the District of Nevada

E. Second Post-Conviction and Appeal:
Federal Public Defender for the District of Nevada

F. Third Post-Conviction and Appeal:
Federal Public Defender for the District of Nevada

GROUNDS FOR RELIEF

Witter hereby asserts the following ground for relief.

CLAIM ONE

Witter's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to a trial by jury and to have every fact exposing him to a harsher sentence proved by the State beyond a reasonable doubt. See U.S. Const. amends. V, VI, VII & XIV; Nevada Const. art. I, §§ 3, 6 & 8.

In violation of these constitutional provisions, the Nevada Supreme Court twice has invalidated statutory aggravating circumstances found against Witter, but then upheld Witter's death sentence by re-weighing the remaining aggravators against the mitigating evidence presented at trial, in violation of Witter's right to a jury trial as set forth in Hurst. Specifically, in July 1996, the Nevada Supreme Court concluded that there was insufficient evidence to support the jury's finding of the "avoid lawful arrest" aggravating circumstance. See Witter v. State, 112 Nev. 908, 928-30, 921 P.2d 886, 900-01 (1996) ["Witter I"]. Then, in October 2009, it concluded that another two statutory aggravators – that the murder was committed in the course of a robbery and, separately, a sexual assault, see Nev. Rev. Stat. § 200.033(4) (1995) – were invalid. See Witter v. State, Case No. 50447, 2009 WL 3571288, at *1 (Nev. Oct. 20, 2009) (unpublished) ["Witter II"]. In both instances, the Nevada Supreme Court nevertheless upheld Witter's death sentence. In 1996, it found, inter alia, that "the remaining four [sic] aggravators clearly outweigh the mitigating evidence presented" by Witter at trial, see Witter I, 112 Nev. at 930, 921 P.2d at 900,

and then, in 2009, it concluded "beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances," see Witter II, 2009 WL 3571288, at *3. Pursuant to U.S. Supreme Court precedent interpreting the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment, only a jury–and not a judge or judges–can find the facts permitting the imposition of a death sentence, and it must do so under beyond-a-reasonable-doubt standard. See Hurst, 136 S. Ct. at 621-24. Such fact-finding includes the process of measuring mitigation against aggravation and determining whether a death sentence is warranted. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal case law. See Nevada Const. art. 1, secs. 3 & 8. The Nevada Supreme Court therefore usurped the jury's constitutional role by reweighing the evidence and affirming Witter's death sentence without applying a reasonable-doubt standard. Now that three of the four aggravators have been nullified by Nevada's highest court, Witter's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers.

The error identified above is structural, because stripping a capital jury of its constitutional fact-finding role at the penalty phase represents a defect affecting the framework within which the trial proceeds, and thus infects the entire trial process. As a result, harmless error analysis is impermissible. If harmless error analysis is applied, the violation is prejudicial. Had the Nevada Supreme Court not engaged in its unlawful reweighing of the mitigation against the aggravation, the court would

instead have remanded for resentencing. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS

1. The jury that sentenced Witter to death based its determination on four aggravating circumstances: (1) that the murder was committed by a person who was previously convicted of a felony involving the use or threat of violation to the person of another; (2)-(3) that the murder was committed while the person of was engaged in the commission of or an attempt to commit a burglary and separately, a sexual assault; and (4) that the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

2. On direct appeal in 1996, the Nevada Supreme Court nullified the fourth aggravating circumstance. Witter I, 112 Nev. at 928-30, 921 P.2d at 900-01. Having struck one aggravator, it nevertheless found, inter alia, that "the remaining four [sic] aggravators clearly outweigh the mitigating evidence presented" by Witter at trial. Id. at 930, 921 P.2d at 900. Accordingly, the Nevada Supreme Court denied Witter's appeal without remanding for a new penalty hearing.

3. In 2009, on a post-conviction appeal, the Nevada Supreme Court nullified the second and third aggravating circumstances identified above, leaving only one valid aggravating circumstance against Witter. Witter II, 2009 WL 3571288, at *1. However, it concluded "beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances." Id. at *3.

Accordingly, the Nevada Supreme Court denied Witter's appeal without remanding for a new penalty hearing.

4. The failure to require a jury to make the outweighing finding beyond a reasonable doubt constitutes structural error which requires vacation of the death sentence.

CLAIM TWO

Witter's death sentence is invalid under U.S. Const. Amends. V, VI, VIII, and XIV, Nevada Const. art. 1, §§ 3, 6 and 8, art. 4 § 2, because the jury in his capital trial was not instructed that in order to find Witter eligible for the death penalty, it must first find that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt.

SUPPORTING FACTS

1. The jury was not properly instructed that it needed to find each element of the offense rendering Witter's death eligible beyond a reasonable doubt. Under Nevada law, eligibility for a death sentence requires the finding of two elements: (1) the existence of one or more statutory aggravating circumstances, and (2) that the mitigating circumstances are not outweighed by the aggravating circumstances. NRS 175.554(3).

2. Witter's jury was instructed in the penalty phase that the findings of aggravating circumstance had to be made beyond a reasonable doubt. See Penalty-Phase Instruction No. 8. The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt.

3. Failure to instruct the jury on the burden of proof beyond a reasonable doubt violated Witter's right to a jury trial, due process of law, and a reliable sentence, and constitutes structural error which is prejudicial per se. In the alternative, the failure of the jury instruction to require that mitigating circumstances are not

outweighed by aggravating circumstances beyond a reasonable doubt was prejudicial, and the State cannot prove beyond a reasonable doubt that the error was harmless.

PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a Writ of Habeas Corpus, vacate Witter's death sentence, and grant him a new sentencing hearing.

DATED this 11th day of January, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declare that they are counsel for the petitioner named in the foregoing petition and know the contents thereof; that the pleading is true of their own knowledge except as to those matters stated on information and belief and as to such matters they believe them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 11th day of January, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with Rule 5(b)(2)(B) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 11th day of January 2017, a true and correct copy of the foregoing PETITION FOR A WRIT OF HABEAS CORPUS (POST-CONVICTION), was served by depositing same for mailing in the United States mail, first-class postage prepaid, addressed to the parties as follows:

Jeffrey M. Conner
Assistant Solicitor General
100 North Carson Street
Carson City, Nevada 89701

Timothy Filson, Warden
Ely State Prison
P.O. Box 1989
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Steven S. Owens
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200 Lewis Avenue
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/s/ Stephanie Young
An Employee of the Federal Public Defender
District of Nevada

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CLERK OF THE COURT

RSPN
STEVEN WOLFSON
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 94C117513 DEPT NO: IV

RESPONSE AND MOTION TO DISMISS FOURTH HABEAS PETITION
DATE OF HEARING: 2/28/17
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits this Response and Motion to Dismiss Fourth Habeas Petition.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In 1995, William Witter was convicted of Murder With Deadly Weapon, Attempt Sexual Assault With Deadly Weapon, and Burglary for assaulting and attempting to rape Kathryn Cox, and then stabbing to death her husband, James Cox, when he tried to come to his wife's aid. Witter received the death penalty. His convictions and sentence were affirmed on direct appeal. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur issued on December 23, 1996.

Witter filed a timely first post-conviction petition which was denied by the district court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 36927). Remittitur issued on September 14, 2001. After litigating a federal habeas petition for several years, Witter returned to state court by filing a second state habeas petition on February 14, 2007. That petition was also denied and again affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 50447). Witter also filed a third state habeas petition on April 28, 2008, which was also denied and affirmed on appeal (SC# 52964). Remittitur from this third habeas appeal issued on February 14, 2011. Thereafter, Witter returned to his federal habeas litigation and currently has an appeal pending in the Ninth Circuit.

Meanwhile, Petitioner has filed his fourth state habeas petition which raises issues based on Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). The State now responds.

ARGUMENT

Petitioner's Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), claim must be denied and/or dismissed as untimely, presumptively prejudicial, waived and abusive pursuant to NRS 34.726, NRS 34.800 and NRS 34.810.

I. The Fourth Petition is Procedurally Barred

A. Application of Procedural Bars is Mandatory

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days

late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a *duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars.

B. NRS 34.726(1)

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). Remittitur issued from Petitioner's direct appeal on December 23, 1996. Therefore, Petitioner had until December 23, 1997, to file a timely habeas petition. Petitioner filed the Fourth Petition on January 11, 2017. As such, the Fourth Petition is time barred.

Even if the one-year rule did not begin to run until Petitioner's new issue was available, the Fourth Petition is still time barred. Petitioner's contention is that, "The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a

reasonable doubt." Fourth Petition, p. 16. Petitioner premises this contention upon Hurst. Id. at 10. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, this complaint is time barred because Petitioner failed to raise it within one year of Ring's publication.

C. NRS 34.800

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). More than five years has passed since Remittitur issued from Petitioner's direct appeal on December 23, 1996. Indeed, over 20 years have passed since Petitioner's direct appeal was final. As such, the State pleads statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against the Fourth Petition. After such a passage of time, the State is prejudiced in its ability to answer the Fourth Petition and retry the penalty-phase. If Petitioner's fourth go around on state post-conviction review is not dismissed or denied on the procedural bars, the State will be forced to track down witnesses who may have died or retired in order to prove a case that is more than two

decades old. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in 1995.

D. NRS 34.810

Petitioner's fourth attempt at state habeas relief must be dismissed on waiver grounds and as an abuse of the writ. Claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b):

> The court *shall dismiss* a petition if the court determines that:
> ...
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) *Raised in a direct appeal or a prior petition* for a writ of habeas corpus or post-conviction relief, *unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner*.

(Emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse of the writ. NRS 34.810(2). Additionally, petitions that re-raise previously rejected complaints must be dismissed. Id.

Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has emphasized that: "[a] court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. __, __, 368 P.3d 729, 734 (2016) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became available to him. Petitioner's contention is that a new penalty hearing is required because of Hurst. Fourth Petition, p. 17. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Petitioner's failure to raise this complaint by June 24, 2003, amounts to a waiver. Petitioner could have raised his Ring complaint during the litigation of his prior petitions or he could have filed an additional petition raising this contention. This complaint could have been presented to this Court at any point after June 24, 2002. Petitioner's failure to do so renders his claim procedurally barred under NRS 34.810.

II. Petitioner Fails to Justify Ignoring the Procedural Bars

This Court cannot disregard the procedural bars because Petitioner has failed to prove good cause and substantial prejudice. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. __, __, 275 P.3d 91, 94-95 (2012), cert. denied, __ U.S. __, 133 S.Ct. 988 (2013).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense

prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas finding by Supreme Court that defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (*citing* Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at __, 275 P.3d at 95, footnote 2). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

A. No Good Cause

Petitioner's failure to prosecute his Ring / Hurst complaint within one year of when it became available precludes a finding of good cause. Petitioner's contention is that a new penalty hearing is required because of Hurst. Fourth Petition, p. 17. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, Petitioner had until June 24, 2003, to bring this claim. Petitioner has done nothing to address the more than fourteen years that have passed between June 24, 2002, and the filing

of the Fourth Petition on January 11, 2017. Ring was continuously available to Petitioner during that nearly fifteen year period. Petitioner's silence is an admission that he cannot demonstrate good cause. Polk v. State, 126 Nev. __, __, 233 P.3d 357, 360-61 (2010); District Court Rules 13(2); Eighth Judicial District Court Rules 3.20(b).

Petitioner cannot demonstrate an impediment external to the defense since Ring has been readily available to him for nearly fifteen years. Petitioner will undoubtedly argue that his change in law impediment should be counted from Hurst and not Ring. However, "[g]ood cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available." Bejarano v. State, 122 Nev. 1066, 1073, 146 P.3d 265, 270 (2006). The issue is when the legal basis arose for Petitioner's newest claim. Hurst's publication date is irrelevant because Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). The entirety of the United States Supreme Court's discussion in Hurst focused on applying Ring to the case before it. Id. The Court ended by concluding:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at __, 136 S.Ct. at 622. Petitioner cannot use Hurst to bootstrap himself into a timely Ring complaint. See, Crump v. State, 2016 Nev. Unpub. Lexis 374, p. 6-7, footnote 5 ("Riley would not provide good cause as it relies on Hern, which has been available for decades").[1]

Nor can Petitioner fall back on allegations of ineffectiveness of prior post-conviction counsel for failing to raise a Ring challenge in a timely fashion since the Federal Public Defender (FPD) has represented Petitioner since 2001. Fourth Petition, p. 7. Further, the decision to litigate in federal court does not excuse Petitioner's failure to comply with

[1] Citation to the unpublished opinion in Crump as persuasive authority is permissible. NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."); MB America Inc. v. Alaska Pacific Leasing Company, 123 Nev. Ad. Op. 8, 15, n.1 (Feb. 4, 2016) (allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

Nevada's procedural default rules. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), abrogated on other grounds, Huebler, 128 Nev. at 197, footnote 2, 275 P.3d at 95, footnote 2.

B. Insufficient Prejudice

Petitioner cannot establish "that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." Huebler, 128 Nev. at __, 275 P.3d at 94-95. Hurst does not apply retroactively to Petitioner. Even if it did, Petitioner received the process he was due under Ring.

1. Hurst Applies Prospectively Only

Hurst is an application of Ring. As explained *supra*, Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 577 U.S. at __, 136 S.Ct. at 621-22. The entirety of this Court's discussion in Hurst focused on applying Ring to the case before it. Id. The Court ended by concluding:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at __, 136 S.Ct. at 622.

The United States Supreme Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S.Ct. 2519, 2522-27 (2004). After an extensive analysis, Schriro concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S.Ct. at 2526-27. Further, other courts have concluded that Hurst is not retroactive. Asay v. State, 2016 Fla. LEXIS 2729, p. 11-12 (Fla. 2016) ("Hurst v. Florida should not apply retroactively to cases that were final when Ring was decided); Reeves v. State, 2016 Ala. Crim. App. LEXIS 37, p. 106 (Crim. App. June 10, 2016) ("Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review.").

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive

application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS 649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."). It is important to note that this burden of proof issue is the entire point of Petitioner's argument. Fourth Petition, p. 16 ("Failure to instruct the jury on the burden of proof beyond a reasonable doubt violated Mr. Echavarria's right to a jury trial, due process of law, and a reliable sentence, and constitutes structural error which is prejudicial per se"). This conclusion, by the only Court offering any support to Petitioner's position, that his argument is fundamentally distinguishable from Hurst should be fatal to his complaint. Regardless, reliance upon the watershed rule of criminal procedure exception to the bar against retroactive application to final convictions is problematic because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006). Petitioner's conviction was final with the 1996 Remittitur from his direct appeal. As such, neither Ring nor Hurst apply to this matter.

2. Neither appellate reweighing nor the selection decision implicate Hurst

Either Petitioner is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on direct appeal and on appeal of the denial of his second habeas petition violated Hurst. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996); Order of Affirmance, SC# 50447, filed October 20, 2009. Both of these complaints are equally unpersuasive because the Nevada Supreme Court has rejected the view that the post-death eligibility selection decision is a factual determination.

Ring applied Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), to Arizona's death penalty scheme, which allowed a judge to determine whether a statutory aggravating circumstance existed. The Ring Court determined that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a

greater offense,' … the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S. Ct. at 2443. Similarly, Hurst concluded:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 577 U.S. at __, 136 S.Ct. at 624.

a. The selection weighing instruction was appropriate

The beyond a reasonable doubt standard does not apply to the selection phase of a capital sentencing proceeding since it is not a factual determination. Nevada capital penalty proceedings comply with the requirements of Apprendi, Ring and Hurst since a jury determines death eligibility using the beyond a reasonable doubt standard:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

Once the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt, thereby establishing death eligibility, the question becomes one of determining the appropriate punishment. However, this second step "is not part of the narrowing aspect of the capital sentencing process. Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what [this Court] has referred to as the selection phase of the capital sentencing process." Lisle v. State, 131 Nev. ___, ___, 351 P.3d 725, 732 (2015). This weighing is not a factual determination and is not subject to the beyond a reasonable doubt standard. Nunnery, 127 Nev. ___, 263 P.3d at 251-53. The Court reached this conclusion in the context of a Ring and Appendi challenge to the omission of the beyond a reasonable doubt standard from Nevada's weighing instruction. Id.

Nevada has long rejected any attempts to apply a reasonable doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the reasonable doubt standard does not apply to this individualized decision by the jurors: "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. ___, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (*citing* Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989)); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond a reasonable doubt standard is permissible because the states enjoy a broad range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S.Ct. 2516, 2525 (2006) (*citing* Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320 (1988)). "Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047 (1990). Accordingly, Hurst imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

b. Appellate reweighing was appropriate

Appellate reweighing after invalidation of an aggravating circumstance is appropriate because it does not involve a factual determination. In Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), the United States Supreme Court found it constitutionally permissible for an appellate court to uphold a death sentence imposed by a jury upon invalidation of an aggravating factor, if the court conducts a harmless error or a reweighing analysis. Id. at 744, 110 S. Ct. at 1446. While Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," such review was constitutionally permissible. Id. at 754, 110 S. Ct. at 1451.

The Nevada Supreme Court resolved the question left to it by the United States Supreme Court as follows:

> A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. If this Court cannot conclude beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance, [the Nevada Supreme Court] must vacate the death sentence and remand the matter to the district court for a new penalty hearing.

Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) (footnote omitted).

Petitioner's radical expansion of Ring and Hurst would require abandonment of Clemons. Such an outcome is contrary to the great weight of authority. Indeed, the United States Supreme Court has arguably already rejected Petitioner's contention. Ring specifically noted that Ring "does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." Ring, 536 U.S. at 597, footnote 4, 122 S.Ct. at 2437, footnote 4. Both Hurst and Ring noted the availability of harmless error review on remand. Hurst, 577 U.S. at ___, 136 S.Ct. at 624; Ring, 536 U.S. at 609, footnote.7, 122 S. Ct. at 2443, footnote 7. Further, in Brown v. Sanders, 546 U.S. 212, 217, 126 S. Ct. 884, 890 (2006), the United States Supreme Court acknowledged the ability of courts in weighing states to engage in harmless error review or reweighing upon invalidating an aggravator. Brown applied a similar analysis to

California's non-weighing death penalty scheme, determining that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Id. at 220, 126 S. Ct. at 892 (footnote omitted). The Court then determined that the invalidated aggravator "could not have 'skewed' the sentence, and no constitutional violation occurred." Id. at 223, 126 S. Ct. at 894.

The Nevada Supreme Court has relied upon Clemons to hold that reweighing in the face of an invalid aggravating circumstance was appropriate. **Bridges v. State,** 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000). Nevada is not alone among the states in approving of Clemons reweighing and/or harmless error review. State v. Abdullah, 158 Idaho 386, 470-71, 348 P.3d 1, 79 (2015); State v. Kirkland, 140 Ohio St. 3d 73, 86-87, 15 N.E.3d 818, 834 (2014); Gillett v. State, 148 So.3d 260, 267-69 (Miss. 2014); State v. Berger, 2014 SD 61 ¶ 31 n.8, 853 N.W.2d 45, 57 n.8 (2014); State v. Hausner, 230 Ariz. 60, 84, 280 P.3d 604, 628 (2012); State v. Sandoval, 280 Neb. 309, 357-58, 364, 788 N.W.2d 172, 214-15, 218 (2010); Billups v. State, 72 So. 3d 122, 134 (Ala. Crim. App. 2010); People v. Mungia, 44 Cal. 4th 1101, 1139, 189 P.3d 880, 907 (2008); State v. Rice, 184 S.W.3d 646, 677 (Tenn. 2006); Myers v. State, 2006 OK CR 12, ¶¶ 105-115, 133 P.3d 312, 336-37 (Okla. Crim. App. 2006); Lambert v. State, 825 N.E.2d 1261, 1263 (Ind. 2005); State v. Sapp, 105 Ohio St. 3d 104, 120, 822 N.E.2d 1239, 1257 (2004).

Similarly, federal appellate courts have endorsed the use of Clemons reweighing and/or harmless-error analysis post-Ring. Pensinger v. Chappell, 787 F.3d 1014, 1029 (9th Cir. 2015); Hanson v. Sherrod, 797 F.3d 810, 839 (10th Cir. 2015); Dixon v. Houk, 737 F.3d 1003, 1013 (6th Cir. 2013); Corcoran v. Levenhagen, 593 F.3d 547, 552 (7th Cir. 2010), vacated and remanded on other grounds, Wilson v. Corcoran, 562 U.S. 1, 131 S. Ct. 13 (2010); Jennings v. McDonough, 490 F.3d 1230, 1248-51 (11th Cir. 2007); United States v.

Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); Allen v. Lee, 366 F.3d 319, 344 (4th Cir. 2004).

The Oklahoma Court of Criminal Appeals specifically considered a challenge to appellate reweighing of aggravating and mitigating circumstances in light of Ring in Torres v. State, 2002 OK CR 35, 58 P.3d 214 (Okla. Crim. App. 2002), cert. denied, 538 U.S. 928, 123 S. Ct. 1580 (2003). The Court concluded:

> Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that Ring requires. Once that finding is made, the substantive elements of the capital crime are satisfied. Contrary to Torres's argument, this Court does not engage in fact-finding on a substantive element of a capital crime when reweighing evidence on appeal. The jury has already found the substantive facts - the existence of aggravating circumstances - and this Court does not substitute its judgment for that of the jury's regarding that finding when reweighing.

Id. at ¶ 7, 58 P.3d at 216.

Appellate reweighing or harmless error review after invalidation of an aggravating circumstance does not implicate factual findings. In Clemons, the High Court determined that, "[e]ven if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." Clemons, 494 U.S. at 752, 110 S. Ct. at 1450. Harmless error analysis is repeatedly and consistently applied in appellate review, and, while in Mississippi the jury was entrusted with the weighing determination, the appellate court was still entitled to review the verdict after invalidating a sentencing factor to determine whether it would remain the same. This holds true even after Ring.

That an appellate court merely utilizes the factual findings of a jury in conducting a reweighing or harmless error analysis fundamentally distinguishes this case from Ring and Hurst. This reality does not change merely because Clemons noted that previous precedent had not required a jury to make the factual findings necessary to impose a death sentence since nothing about appellate reweighing or harmless error analysis invades the province of the jury in determining the existence of statutory aggravators that make a defendant death

eligible. A jury's factual determination of whether a defendant is death eligible is *all* Ring requires, and the jury in this case made that decision.

Nor is appellate reweighing or harmless error analysis suddenly taboo merely because Hurst overruled Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984). Hildwin and Spaziano are no longer good law because "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, 577 U.S. at __, 136 S.Ct. at 624. While Clemons relied on those cases in part, appellate reweighing and harmless error review comports with Ring, because the jury still finds the facts necessary to make a defendant death eligible (in Nevada, the existence of a statutory aggravator), and the appellate court does not serve to find new facts making a defendant eligible for the death penalty.

As the Oklahoma Court of Criminal Appeals said in Torres:

> this Court does not engage in fact-finding on a substantive element of a capital crime when reweighing evidence on appeal. The jury has already found the substantive facts - the existence of aggravating circumstances - and this Court does not substitute its judgment for that of the jury's regarding that finding when reweighing.

Torres, 2002 OK CR 35, ¶ 7, 58 P.3d 214, 216.

Because Clemons reweighing comports with the requirements of Ring and because Petitioner received all the protections required by Ring, the Fourth Petition must be dismissed and/or denied because of Petitioner's procedural defaults.

III. Finality of Judgment of Conviction

Lastly, Petitioner claims that this petition is not subject to state procedural default rules because his amended Judgment of Conviction determined that restitution was appropriate but left the final amount of restitution "to be determined" and therefore was not a final judgment according to Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012). It is true that "a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment." Id.; see also Slaatte v. State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013) ("Because the judgment of conviction contemplates restitution in an uncertain

amount, it is not final and therefore is not appealable"). However, none of this applies to Petitioner's original Judgment of Conviction filed on August 4, 1995, which neither determined that restitution was appropriate nor left an amount of restitution uncertain. See Exhibit 1. Unlike Whitehead and Slaatte, Petitioner's original Judgment of Conviction was a final appealable judgment. This is simply not a situation where an "intermediate judgment" is insufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus

Furthermore, Petitioner's amended Judgment of Conviction filed a week later on August 11, 1995, did in fact set restitution in an amount certain of $2,790. See Exhibit 2. Although it also purported to assess "an additional amount to be determined," Whitehead and Slaatte's judgments were incomplete because they had not fixed any part of restitution that could be enforced as a final judgment. See Silva v. State, No. 70267, 2016 Nev. Unpub. LEXIS 661, at *2-3 (Aug. 30, 2016); Logan v. State, No. 66540, 2015 Nev. Unpub. LEXIS 575, at *2-4 n.2 (May 18, 2015). As in Logan, Petitioner could have challenged the restitution amount on direct appeal and the failure to do so constitutes a waiver. Petitioner's original judgment and amended judgment together constituted final appealable judgments the same as in Silva.

CONCLUSION

Based on the foregoing, the Fourth Petition is untimely, presumptively prejudicial, waived and abusive without sufficient justification to ignore Petitioner's procedural defaults. As such, the Fourth Petition must be dismissed and/or denied.

Dated this 31st day of January, 2017.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Response and Motion to Dismiss Fourth Habeas Petition, was made this 31st day of January, 2017, by Electronic Filing to:

MICHAEL PESCETTA
Email: Michael_pescetta@fd.org

TIFFANY L. NOCON
Email: Tiffany_Nocon@fd.org

By: /s/ E.Davis
Employee, District Attorney's Office

SSO//ed

EXHIBIT 1

EXHIBIT 1

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FILED IN OPEN COURT
AUG 4 1995
LORETTA BOWMAN, CLERK
By Deputy

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM WITTER, aka William Lester Witter, #1204227 Defendant.	CASE NO. C117513 DEPT. NO. IX DOCKET NO. W

JUDGMENT OF CONVICTION

WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM WITTER, aka William Lester Witter, entered a plea of Not Guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060; and

WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE

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OF A DEADLY WEAPON (Felony); and COUNT IV - BURGLARY (Felony), in violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury verdict was returned on or about the 28th day of June, 1995. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

That on or about the 13th day of July, 1995, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy District Attorney, also being

present; the above-entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant to DEATH for COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 4 day of ~~July~~ August, 1995, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

94-117513X/pce
LVMPD DR#9311141809
1° MURDER W/WPN - F

EXHIBIT 2

EXHIBIT 2

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FILED

AUG 11 2 18 PM '95

CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM WITTER, aka William Lester Witter, #1204227 Defendant.	CASE NO. C117513 DEPT. NO. IX DOCKET NO. N

A M E N D E D
JUDGMENT OF CONVICTION

WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM WITTER, aka William Lester Witter, entered a plea of Not Guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060; and

WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE

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AUG 29 1995

CE31

OF A DEADLY WEAPON (Felony); and COUNT IV - BURGLARY (Felony), in violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury verdict was returned on or about the 28th day of June, 1995. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

That on or about the 13th day of July, 1995, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy District Attorney, also being

present; the above-entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant, as follows: As to COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, Defendant was sentenced to DEATH by lethal injection; as to COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON, said sentence imposed in Count III to run consecutive to the sentence imposed in Count II; as to COUNT IV - BURGLARY, Defendant was sentenced to TEN (10) YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to run consecutive to the sentence imposed in Count III. Defendant is to pay RESTITUTION

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in the amount of $2,790.00, with an additional amount to be determined. Defendant is given 627 days credit for time served.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Amended Judgment of Conviction as part of the record in the above entitled matter.

DATED this 11 day of August, 1995, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

94-117513X/pce
LVMPD DR#9311141809
1° MURDER W/WPN - F

OMD
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Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM WITTER,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison, and ADAM PAUL LAXALT, Attorney General for the State of Nevada.

Respondents.

Case No. 94C117513
Dept. No. 23

Date of Hearing: April 19, 2017
Time of Hearing: 11:00 a.m.

OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS

(Death Penalty Habeas Corpus Case)

Petitioner William Witter opposes the State's Response and Motion to Dismiss Defendant's Fourth Habeas Petition ("Motion" or "Mot.").

/ / /

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Mr. Witter bases this Opposition to the State's Motion on the attached memorandum of points and authorities and the entire file in this matter.

DATED this 8th day of March, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

William Witter was sentenced to death after a capital trial. The jury found Mr. Witter eligible for the death penalty because it found four aggravating circumstances and concluded mitigation evidence did not outweigh the aggravating circumstances. The trial court failed to instruct the jury that the State was required to prove beyond a reasonable doubt that the mitigation evidence did not outweigh the aggravating circumstances. On July 22, 1996, on Mr. Witter's direct appeal, the Nevada Supreme Court struck one of the four aggravators the jury found. The Nevada Supreme Court relied on the three remaining aggravators for reweighing and finding Mr. Witter death-eligible. On October 20, 2009, during exhaustion proceedings, the Nevada Supreme Court struck two of the remaining three aggravators the jury found. Nevertheless, the Nevada Supreme Court relied on the one sole remaining aggravator for reweighing and finding Mr. Witter death-eligible.

On January 12, 2016, the United States Supreme Court issued a decision in Hurst v. Florida, 136 S. Ct. 616 (2016). On January 11, 2017—less than one year after the Hurst decision—Mr. Witter filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition" or "Pet."). Mr. Witter's Petition presents two claims premised on Hurst: (1) the Nevada Supreme Court improperly upheld Mr. Witter's death sentence by reweighing the remaining aggravators against the mitigating evidence presented at trial to determine that Mr. Witter's jury would have found him death-eligible; and (2) Mr. Witter's jury was not properly instructed that it needed to find each element of the offense rendering Mr. Witter death eligible beyond a

reasonable doubt. Moreover, no procedural default rules apply to Mr. Witter's claims because the uncertain restitution amount on his Amended Judgment of Conviction means his conviction is not final. Hence, this Court must vacate Mr. Witter's death sentence and grant him a new sentencing hearing.

The State filed a Motion to Dismiss Mr. Witter's Petition, arguing the Petition should be dismissed on four grounds. First, the State contends Mr. Witter's original Judgment of Conviction and Amended Judgment of Conviction culminated in a certain restitution amount rendering Mr. Witter's conviction final. The State contends this finality subjects Mr. Witter's claims to procedural bars. Second, the State contends Mr. Witter's Petition is procedurally defaulted and invokes three procedural bars. Third, the State contends Mr. Witter's Hurst claims fail on their merits. Fourth, the State contends that, even if Mr. Witter's interpretation of Hurst is correct, Hurst does not apply retroactively to Mr. Witter's death sentence.

The State's arguments fail. First, Mr. Witter's Amended Judgment of Conviction superseded the original Judgment of Conviction entirely and the Amended Judgment of Conviction lacks a certain restitution amount. Accordingly, Mr. Witter's conviction is not final, rendering procedural bars inapplicable. Second, Mr. Witter can overcome all of the procedural bars the State invokes based on the January 2016 Hurst decision. Once Hurst was decided, Mr. Witter filed the Petition and raised his claims within a year of the decision, in compliance with Rippo v. State, 132 Nev. __, 368 P.3d 729, 739-40 (2016), reh'g denied (May 19, 2016), cert. granted, judgment vacated on other grounds sub nom. Rippo v. Baker, No. 16-6316, 2017 WL 855913

(U.S. Mar. 6, 2017). Third, Mr. Witter's Hurst claims have merit because Hurst established the State must prove that the mitigating circumstances do not outweigh the aggravating circumstance to a jury beyond a reasonable doubt. Fourth, Hurst applies retroactively because the United States Supreme Court has recognized that the beyond-a-reasonable-doubt standard of proof is indispensable to the administration of justice and protects individuals from the possibility of wrongful convictions and sentences. Accordingly, this Court must deny the State's Motion to Dismiss the Petition.

II. BECAUSE NO CERTAIN RESTITUTION AMOUNT ATTACHED TO MR. WITTER'S CONVICTION, HIS CONVICTION IS NOT FINAL AND THE PETITION IS NOT SUBJECT TO PROCEDURAL BARS

The State argues the Petition is subject to three procedural bars: (1) the timeliness provisions of NRS 34.726; (2) the successive petition and abuse-of-the-writ bars contained in NRS 34.810; and (3) the laches provisions of NRS 34.800. The State argues Hurst "was merely an application of" Ring v. Arizona, 536 U.S. 584 (2002), and therefore Mr. Witter's claims premised on Hurst are untimely because they could have been raised at some earlier point in time. See Mot. at 4, 6, 7, 8, 9. Mr. Witter responds to this argument in Section III, infra.

Before reaching these issues, however, this Court must resolve a more fundamental issue. As explained in the Petition, Mr. Witter's claims are timely because the operative Amended Judgment of Conviction in his case, filed August 11, 1995, is not a valid judgment of conviction under clearly established Nevada law because it "imposes restitution in an uncertain amount." See Pet. at 9-10 (citing Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012) (en banc), and Slaatte v. State,

129 Nev. __, 298 P.3d 1170, 1170-71 (2013) (per curiam)). From this point, it follows Mr. Witter's Petition is timely because none of the events triggering his obligation to file a post-conviction petition for a writ of habeas corpus have yet occurred. Whitehead and Slaatte demonstrate the Amended Judgment of Conviction does not amount to a final appealable judgment, such that Mr. Witter's time for filing a direct appeal has not yet begun to run: "In this appeal, we address a threshold jurisdiction issue: Is a judgment of conviction that imposes restitution in an uncertain amount an appealable final judgment? We conclude that it is not, and, as a result, we dismiss this appeal for lack of jurisdiction." Slaatte, 129 Nev. __, 298 P.3d at 1170; see also Whitehead, 128 Nev. at __, 285 P.3d at 1055.

From this, it follows that the time for the filing of a post-conviction petition for a writ of habeas corpus has not yet begun to run. This, too, is clear from the Nevada Supreme Court's jurisprudence:

> Based on the requirement in NRS 176.105(1)(c) that the amount of restitution be included in the judgment of conviction if the court imposes restitution, we concluded "that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment" and therefore it does not trigger the one-year period for filing a habeas petition.

Slaatte, 129 Nev. __, 298 P.3d at 1171 (quoting Whitehead, 128 Nev. at __, 298 P.3d at 1055).

The Whitehead case is particularly instructive. There, the district court dismissed a post-conviction habeas petition as untimely, basing its calculation on the date of a judgment of conviction that did not set a specific dollar amount of restitution. See Whitehead, 128 Nev. at __, 298 P.3d at 1054, 1055. The en banc Nevada Supreme

Court unanimously reversed, concluding that the petitioner's time for filing his habeas petition did not begin to run until the filing of a second amended judgment conviction that set forth a specific dollar amount of restitution; based on that date, the petitioner's petition was timely. See id. So too in Mr. Witter's case: this Court would be committing reversible error to dismiss his petition based on the filing date of a judgment of conviction "that imposes a restitution obligation but does not specify its terms." Whitehead, 128 Nev. at __, 298 P.3d at 1055.

The State attempts to distinguish Whitehead and Slaatte on the ground that the judgments of conviction in those cases, unlike Mr. Witter's case, "had not fixed any part of restitution that could be enforced as a final judgment." See Mot. at 17. In other words, the State's position is: if a judgment of conviction sets any amount of restitution, even if leaves some additional amount to be determined at a later date, this is sufficient to constitute a final judgment of conviction under Whitehead. This is, of course, entirely contrary to Whitehead, because the question is whether the purported final judgment is in fact final under NRS 176.105(1)(c), not whether some other, superseded order might be final.

In support of this argument, the State cites two unpublished orders of the Nevada Supreme Court, Silva v. State, No. 70267, 2016 WL 4601867 (Nev. Aug. 30, 2016) and Logan v. State, No. 66540, 2015 WL 2448026 (Nev. May 18, 2015). Neither unpublished order supports the State's position. In Silva, the Nevada Supreme Court reaffirmed the rule set forth in Slaatte, that "where restitution is appropriate, the precise amount of restitution is required to be included in the judgment of conviction."

See Silva, 2016 WL 4601867, at *1 (emphasis added). The remainder of the Nevada Supreme Court's Silva decision addressed a situation in which the appellant sought to extend the rule set forth in Slaatte to judgments of conviction that fail to specify: (1) the fine required under NRS 484C.410; (2) that appellant would be subject to the installation of a breath interlock device under NRS 484C.460; and/or (3) the appropriate amount of time served. See id. at *1. The Nevada Supreme Court held that, unlike judgments of conviction that failed to specify the "precise amount" of restitution, neither "the failure to impose the required fine and condition, nor the error with respect to the credit for time served, rendered the judgments of conviction non-final." Id.[1] The unpublished order in Silva, which has no precedential value, cannot limit the precedential authority of Whitehead by analysis of parts of a judgment other that the restitution requirement explicitly addressed in Whitehead. See NRAP 36(3)(c); MB Am., Inc. v. Alaska Pac. Leasing, 132 Nev. __, 367 P.3d 1286, 1292 n.1 (2016).

The State's citation to Logan is even farther afield. There, the petitioner originally pursued a direct appeal following a conviction on two counts of exploitation of an older or vulnerable person, for which she was sentenced to a prison term "and ordered to pay restitution in the amount of $215,431.33," see Logan, 2015 WL 2448026, at *1, that is, the appellant's judgment of conviction contained the "precise

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[1] To be clear, none of the judgments of conviction at issue in Silva involved an award of restitution. See Judgment of Conviction, State v. Silva, Case No. C280421-1 (Nev. 8th Jud. Dist. Ct. filed June 3, 2014); Amended Judgment of Conviction, State v. Silva, Case No. C280421-1 (Nev. 8th Jud. Dist. Ct. filed Nov. 2, 2015); Second Amended Judgment of Conviction, State v. Silva, Case No. C280421-1 (Nev. 8th Jud. Dist. Ct. filed Mar. 25, 2016).

amount" of restitution, a fact confirmed by the underlying judgment of conviction, see Judgment, State v. Logan, Case No. CR10-1342 (Nev. 2nd Jud. Dist. Ct. filed Oct. 14, 2011). The only question before the Nevada Supreme Court in Logan's subsequent appeal was, whether having failed to challenge on direct appeal the amount of restitution fixed by the district court, she was entitled to challenge this amount on a subsequent motion to correct judgment; the Nevada Supreme Court concluded she could not. See Logan, 2015 WL 2448026, at *1.

What this Court is left with, then, is the plain language of the Nevada Supreme Court's prior decisions: A judgment of conviction that "imposes restitution in an uncertain amount," or fails to set forth a "precise amount," is not sufficient to trigger the statutory time limits imposed for filing an amended petition. The Amended Judgment of Conviction in this case–obligating Mr. Witter "to pay RESTITUTION in the amount of $2,790.00, with an additional amount to be determined"–fits squarely within that rule, and, accordingly, there is no procedural obstacle to this Court's consideration of Mr. Witter's Petition on the merits.

Next, the State suggests that, rather than look at the Amended Judgment of Conviction filed on August 11, 1995, this Court should look to the original Judgment of Conviction filed August 4, 1995, which contained no award of restitution, and dismiss Mr. Witter's Petition on that basis. See Mot. at 17; Ex. 1. However, the trial court minutes in this case establish that Mr. Witter's judgment of conviction was always intended to involve an award of restitution (albeit in an uncertain amount), even before the filing of the original Judgment of Conviction, and it was presumably

amended on that basis to reflect the trial court's intent. See Criminal Court Mins., Aug. 3, 1995.

To now treat the original August 4, 1995, Judgment of Conviction as the controlling document would be contrary to clearly established law. The Nevada Supreme Court has identified two types of amended judgments: (1) those entered to correct a clerical error in the original judgment, such as that in Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004), and expressly permitted under NRS 176.565; and (2) those circumstances where a judgment is amended to include "an integral part of the sentence," including the precise amount of restitution, as in Whitehead. See generally Whitehead, Nev. at __, 298 P.3d at 1055 (discussing and distinguishing Sullivan); NRS 176.105(1)(c). This distinction is derived from the common law and found throughout Nevada law. See, e.g., Finley v. Finley, 65 Nev. 113, 119-20, 189 P.2d 334, 337 (1948) (noting distinction between amendments to correct clerical errors and those which "enlarge or in any manner substantially alter the rights of the parties") overruled on other grounds Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964). From this point, it is plain that Mr. Witter's Amended Judgment of Conviction superseded the prior Judgment of Conviction entirely.

Thus, the Amended Judgment of Conviction in his case, filed August 11, 1995, is not a final judgment of conviction under clearly established Nevada law because it imposes restitution in an uncertain amount. The incomplete Amended Judgment of Conviction means Mr. Witter's conviction is not final and Mr. Witter's claims are not procedurally barred.

III. MR. WITTER'S HURST CLAIMS ARE NOT PROCEDURALLY BARRED

A. Mr. Witter Can Overcome All Three Procedural Bars Raised By The State Because He Can Show Good Cause And Prejudice

Assuming for the sake of argument that procedural bars do apply, Mr. Witter can overcome all three of the procedural defaults the State invokes by establishing good cause for his previous failure to file the Petition, and prejudice. "A showing of good cause for the delay in raising a claim has two components: (1) that the delay was not the petitioner's fault and (2) that dismissal of the petition as untimely will unduly prejudice the petitioner." Rippo, 368 P.3d at 738 (internal citation and quotation marks omitted). The Nevada Supreme Court held that a showing of good cause and prejudice overcomes the procedural bars set forth in both NRS 34.726 and NRS 34.810, see id. at 736-38; see also Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001), and that a showing of good cause and prejudice can also overcome NRS 34.800's laches provisions. See State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (holding State's invocation of NRS 34.800 would be meritless because petitioner established good cause and prejudice).

First, to demonstrate "good cause," Mr. Witter must demonstrate that an "impediment external to the defense" prevented him from raising the Petition's claims earlier. See Rippo, 368 P.3d at 738; Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "'A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default.'" Rippo, 368 P.3d at 738 (quoting Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003))

(emphasis added). In particular, the Nevada Supreme Court has held that good cause to overcome a state procedural default exists when "a federal court concludes that a determination of this court is erroneous." Evans v. State, 117 Nev. 609, 644, 29 P.3d 498, 521 (2001), overruled in part on other grounds by Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015). To satisfy the good cause requirement, Mr. Witter must show he raised the Petition's claims within a "reasonable time"—namely, one year—"after the basis for the claim bec[ame] available." Rippo, 368 P.3d at 739-40. Second, "[a] showing of undue prejudice necessarily implicates the merits of the" procedurally defaulted claim. Id. at 740.

Mr. Witter can demonstrate good cause and prejudice because the Petition's claims are based on a new rule of constitutional law announced by the United States Supreme Court in Hurst. As set forth in further detail in Section IV.C., Hurst held that a determination that the mitigating circumstances do not outweigh the aggravating circumstances (hereinafter, the "weighing determination"), when required by a state for imposition of the death penalty, is a "fact" that increases a defendant's statutory maximum punishment. As a result, the weighing determination constitutes an "element" of the offense of conviction that is subject to various procedural protections under the Due Process Clause and the Sixth Amendment. Namely, a jury must perform the weighing determination and the State must prove it beyond a reasonable doubt. Hurst effectively overruled the Nevada Supreme Court's decisions in McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009), and Nunnery v. State, 127 Nev. 749, 770-76, 263 P.3d 235, 250-53

(2011). In McConnell and Nunnery, the Nevada Supreme Court had held that the weighing determination was not a "factual" determination subject to the procedural protections of the Due Process Clause and the Sixth Amendment. See Nunnery, 127 Nev. at 776, 263 P.3d at 253; McConnell, 125 Nev. at 254, 212 P.3d at 314-15.

In the Petition, Mr. Witter claims he was not afforded the procedural protections to which Hurst entitles him. The Nevada Supreme Court upheld Mr. Witter's death sentence by reweighing the remaining aggravators against the mitigating evidence presented at trial, but Hurst held a jury must perform such weighing. Moreover, as set forth in Section IV, infra, the Nevada Supreme Court has held for three decades that a jury must conclude the mitigating circumstances do not outweigh the aggravating circumstances of a crime to find a defendant eligible for the death penalty in Nevada. Hence, the jury at Mr. Witter's 1995 capital trial was instructed that this weighing determination was necessary to consider the death penalty. Critically, however, the jury was not instructed that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. The Nevada Supreme Court's reweighing of aggravators against the mitigating evidence presented at trial and the trial court's failure to instruct the jury as to the State's burden of proof constituted structural errors under Hurst that necessitate vacating Mr. Witter's death sentence.

Mr. Witter can overcome all of the procedural defaults the State raises because he can establish good cause and prejudice. Had Mr. Witter raised his claims in this Court prior to Hurst, the Court would have denied the claims as meritless because of

McConnell and Nunnery. The decision in Hurst serves as good cause for Mr. Witter's failure to raise his claims sooner because it established the merit of Mr. Witter's claims and effectively overruled McConnell and Nunnery. See Rippo, 368 P.3d at 738; see also Evans, 117 Nev. at 644, 29 P.3d at 521 (recognizing that a federal court's reversal of a Nevada Supreme Court decision constitutes good cause to excuse a procedural default). Moreover, Mr. Witter raised his claims within one year of Hurst: Hurst was decided on January 12, 2016, and Mr. Witter filed his Petition on January 11, 2017. Rippo, 368 P.3d at 739-40. Finally, with respect to prejudice, Mr. Witter's claims have merit because the trial court's failure to instruct the jury regarding the beyond-a-reasonable-doubt standard constituted structural error. Consequently, Mr. Witter has established good cause and prejudice.

The State repeatedly argues Mr. Witter could have raised his claims before Hurst was decided. Mot. at 3-8. According to the State, "Hurst was merely an application of Ring [v. Arizona, 536 U.S. 584, 586 (2002)]." Mot. at 6. In other words, the State contends that the legal basis for Mr. Witter's claims was available at the time Ring was decided. Id. In support, the State quotes language within the Hurst decision citing and relying on Ring's reasoning. Id. The State concludes that because Ring was decided on June 24, 2002, Mr. Witter should have raised his claims within one year from this date—namely, June 24, 2003. Id.

The State, however, fails to acknowledge that the Nevada Supreme Court rejected Ring's application to Nevada's weighing requirement in cases such as Nunnery and McConnell. While Mr. Witter might disagree with the Nevada Supreme

Court's prior analysis of this issue, the fact remains that it was not until Hurst was decided that the United States Supreme Court spoke unequivocally on the issues before this Court. In this regard, Mr. Witter is essentially in the same position as Delaware litigants who pursued claims in the wake of Hurst. In both Delaware and Florida, courts had rejected, prior to Hurst, the proposition that a jury must conduct its weighing analysis under a reasonable doubt standard. See, e.g., Brice v. State, 815 A.2d 314, 322 (Del. 2003) ("Ring does not extend to the weighing phase."); Ault v. State, 53 So. 3d 175, 206 (Fla. 2010) (concluding that "a jury did not have to be instructed that it was required to balance aggravating and mitigating circumstances using a 'reasonable doubt' standard"). After Hurst, however, the Delaware Supreme Court understood the impact of Hurst and overruled its prior decisions to the contrary. See Rauf v. State, 145 A.3d 430, 434 (2016) (concluding, under Hurst, that the jury weighing determination must be made by a jury unanimously and beyond a reasonable doubt, and overruling its prior decisions to the extent they are inconsistent with this holding).[2] In short, it is Hurst, not Ring, which unequivocally establishes Mr. Witter's entitlement to relief.

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[2] Similarly, on remand from the United States Supreme Court, the Florida Supreme Court recognized that the Sixth Amendment gives capital defendants the right to have a jury make all findings required under law in order for the death penalty to be considered as a sentencing option, including, in Florida as well as Nevada, the "additional factfinding" that "the aggravating factors outweigh the mitigating circumstances." See Hurst v. State, 202 So.3d 40, 53-54 (2016). Though it did not have occasion to reach the issue of the appropriate standard of proof for this weighing determination, its recognition of the weighing determination as "additional factfinding" as a condition of death-eligibility, compels the conclusion that this determination must be made beyond a reasonable doubt. See Hurst, 136 S. Ct. 616, 622 (2016) (the Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of crime be proved to a jury beyond a reasonable doubt").

B. NRS 34.800 Does Not Bar Mr. Witter's Petition For Additional Reasons

1. NRS 34.800 does not apply to Mr. Witter's Petition because the delay in filing the Petition is not attributable to Mr. Witter

NRS 34.800 does not bar Mr. Witter's Petition for additional reasons. As an initial matter, NRS 34.800 does not apply to Mr. Witter's Petition. The Nevada Supreme Court held in State v. Powell, 122 Nev. 751, 758-59, 138 P.3d 453, 458 (2006), that NRS 34.800 does not bar a habeas petitioner's claim if delay in raising the claim cannot be attributable to the petitioner.

In Powell, a petitioner's judgment of conviction was entered in 1991. Powell, 122 Nev. at 758, 138 P.3d at 458. However, resolution of the petitioner's direct appeal was delayed until 1997. The Nevada Supreme Court "erroneously decided that a new rule of criminal procedure announced by the [United States] Supreme Court soon after [the petitioner]'s trial did not apply to his case," and the United States Supreme Court subsequently reversed the erroneous decision. Id. After his direct appeal was resolved, the petitioner promptly filed a habeas petition in 1998 and was granted partial relief in 2002. Id. On appeal, the State maintained the passage of time since the petitioner's conviction rendered the petition procedurally barred by NRS 34.800. Id. The Nevada Supreme Court rejected the State's argument, concluding the State was "not entitled to relief under NRS 34.800," because "[t]he record indicates that [the petitioner] has not inappropriately delayed this case." Id.

As in Powell, the delay in filing the instant Petition cannot be attributed to Mr. Witter; he had no control over the timing of the Hurst decision, which implicitly overruled the Nevada Supreme Court's Nunnery decision. See, e.g., Hernandez v.

State, 124 Nev. 639, 651, 188 P.3d 1126, 1134 (2008) (intervening controlling authority justifies rejecting state decisions). And there is no rational basis for finding that the period between the decision in Hurst and the filing of the petition, within the period described by Rippo, resulted in any prejudice to the State. Accordingly, under Powell, NRS 34.800 cannot apply to bar Mr. Witter's Petition.

2. Even if NRS 34.800 applies to Mr. Witter's Petition, Mr. Witter can overcome any presumption of prejudice to the State

Even assuming NRS 34.800 is applicable to Mr. Witter's Petition, Mr. Witter can overcome any presumption of prejudice to the State. The Hurst claim in this Petition raises a purely legal issue. The State's response to the Petition demonstrates that there has been no prejudice to the State in responding to it. The State has not shown any inability to muster legal arguments in opposition to Mr. Witter's claim. Mr. Witter could not have had knowledge of the controlling authority supporting his claim until Hurst was decided, see 27-33 below, and filed his Petition within a reasonable time, one year, after the Hurst decision. See Rippo, 368 P.3d at 739-40; NRS 34.800(1)(a). Similarly, the record in this case rebuts any legitimate claim of prejudice to the State's ability to retry Mr. Witter as a result of the delay. In fact, the record in this case shows that a retrial of the penalty phase at this point would be more reliable than the original one. In the intervening time, the Nevada Supreme Court has stricken three of the four aggravating factors as invalid that were nonetheless considered by the jury in making the death-eligibility and selection of punishment determinations. Further, Mr. Witter has accrued significant mitigation evidence that was not presented at trial due to the ineffective assistance of counsel;

and the consideration of all relevant mitigation evidence is a necessary part of imposing a sentence that is reliable within the meaning of the Eighth Amendment. See e.g., Soars v. Lipton, 561 U.S. 945, 954-56 (2010) (per curiam); Porter v. McCollum, 558 U.S. 30, (2009) (per curiam); Wiggins v. Smith, 539 U.S. 510, 522, 534-35 (2003); Lockett v. Ohio, 438 U.S. 586, 604 (1978). The State does not have a legitimate interest in upholding a sentence produced by consideration of impermissible aggravation and lack of consideration of relevant mitigation merely because of the passage of time, when a retrial now would provide a more constitutionally reliable result. See Berger v. United States, 295 U.S. 78, 88 (1935) (the State is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal case is not that it shall win a case, but that justice shall be done."). Here, the record rebuts any presumption of legitimate prejudice to the State in retrying Mr. Witter.

Finally, Mr. Witter can rebut the presumption that the State has been prejudiced in its ability to retry him for an additional reason: he can make a "colorable showing" that he is ineligible for the death penalty in light of Hurst. Emil, 2010 WL 3271510, at *2 (quoting Pellegrini, 117 Nev. at 887, 34 P.3d at 537). Under Hurst, Mr. Witter's jury should have been instructed that it could not have sentenced him to death unless it found beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances of his crime. Had Mr. Witter's jury been correctly instructed pursuant to Hurst, Mr. Witter would not have been found eligible for the death penalty. At Mr. Witter's 1995 capital trial, the jury found Mr.

Witter eligible for the death penalty because it found four aggravating circumstances and concluded that they were not outweighed by any mitigation evidence. On July 22, 1996, on Mr. Witter's direct appeal, the Nevada Supreme Court struck one of the four aggravators. The Nevada Supreme Court relied upon the three remaining aggravators for finding Mr. Witter death-eligible. On October 20, 2009, during exhaustion proceedings, the Nevada Supreme Court struck two of the remaining three aggravators. Nevertheless, the Nevada Supreme Court relied upon the one remaining aggravator for finding Mr. Witter death-eligible. Given the Nevada Supreme Court struck all but one of the aggravators the jury found, it is unlikely that the jury would have found Mr. Witter death-eligible if it had been properly instructed as to the State's burden of proof pursuant to Hurst. Hence, Mr. Witter can make a "colorable showing" that he is ineligible for the death penalty and thereby overcome the presumption that the State has been prejudiced in responding to the Petition. See NRS 34.800(1)(a); Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Accordingly, Mr. Witter's Petition is not procedurally defaulted on any of the grounds raised by the State.

IV. MR. WITTER'S HURST CLAIMS HAVE MERIT

Hurst held that the weighing determination constitutes an "element" of the crime that the State must prove to a jury beyond a reasonable doubt under the Due Process Clause of the Fourteenth Amendment to the Constitution. The Nevada Supreme Court—not a jury—twice reweighed remaining aggravating circumstances against mitigating evidence presented at trial to uphold Mr. Witter's death sentence.

Moreover, Nevada law requires that a criminal defendant cannot be sentenced to death unless a jury finds that the mitigating circumstances do not outweigh the aggravating circumstances of the crime. During Mr. Witter's trial, the trial court instructed the jury that it had to make this weighing determination in order to find Mr. Witter eligible for death. However, the trial court failed to instruct the jury that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. As set forth below, the trial court's failure to provide such an instruction was erroneous under Hurst. Accordingly, Mr. Witter's death sentence must be vacated.

A. Nevada Is a "Weighing State," Where A Jury Must Weigh Aggravating and Mitigating Circumstances To Establish Death-Eligibility

The United States Supreme Court has instructed that the capital sentencing process 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). Second, after a defendant has been found eligible for the death penalty based on these requirements, the factfinder must "determine[] whether to impose a death sentence on an eligible defendant," at the "selection phase." Buchanan v. Angelone, 522 U.S. 269, 275 (1998). During the selection phase, the sentencer must be allowed to "weigh the [aggravating] facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence" and "select" whether "a defendant eligible for the

death penalty should in fact receive that sentence." Tuilaepa v. California, 512 U.S. 967, 972 (1994).

States have adopted two approaches when crafting requirements for death-eligibility. Some states, known as "non-weighing states," provide that a sentencer need only "find the existence of one aggravating factor" during the eligibility phase to render a defendant death-eligible. Stringer v. Black, 503 U.S. 222, 229 (1992). Other states, known as "weighing states," require that "the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." Parker v. Dugger, 498 U.S. 308, 318 (1991). Hence, in weighing states, a defendant's death-eligibility is determined by both: (1) finding the existence of an aggravating circumstance; and (2) weighing it against mitigating circumstances. See id.

The Nevada Supreme Court has explicitly described Nevada as a "weighing state," where a jury must weigh aggravating and mitigating circumstances during the eligibility phase. See Canape v. State, 109 Nev. 864, 879, 859 P.2d 1023, 1032 (1993). Nevada's death penalty statute provides that "[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3) (emphasis added); see also NRS 200.030(4)(a) (holding that the death penalty can be imposed for first-degree murder "only if . . . any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

For the past three decades, the Nevada Supreme Court has consistently interpreted these statutes to mean "two things are necessary before a defendant is eligible for death: [(1)] 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 [(2)] determine that any mitigating circumstances do not outweigh the aggravating." Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); see also Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."); Williams v. State, 113 Nev. 1008, 1024 n.8, 945 P.2d 438, 447 n.8 (1997) (interpreting death penalty statute "as stating that the death penalty is an available punishment only if the state can prove beyond a reasonable doubt at least one aggravating circumstance exists, and that the aggravating circumstance or circumstances outweigh the mitigating evidence offered by the defendant") (internal citation and quotation marks omitted); Ybarra v. State, 100 Nev. 167, 176, 679 P.2d 797, 802 (1984) ("The sentencing authority must . . . determine whether the mitigating factors outweigh the aggravating factors; if they do not, the death penalty may be imposed."). Once a defendant's death-eligibility is established, the proceedings shift to the selection phase and the jury "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.

The Nevada Supreme Court has repeatedly re-affirmed that the jury must weigh aggravating and mitigating circumstances in the eligibility phase. For instance, in Johnson v. State, the Nevada Supreme Court described the death-eligibility process as follows:

> Nevada statutory law requires two distinct findings to render a defendant death-eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada . . . .

118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (quoting then-existing language in NRS 175.554(3)) (emphasis in original), overruled on other grounds by Nunnery, 127 Nev. 749, 263 P.3d 235. In Nunnery, the Nevada Supreme Court approvingly recited Johnson's summary of Nevada capital sentencing procedures and re-affirmed that the weighing determination is a requirement for death-eligibility in Nevada. See 127 Nev. at 771, 263 P.3d at 250. Hence, the Nevada Supreme Court's longstanding precedent makes clear that, as in other weighing states, a jury must weigh aggravating and mitigating circumstances to find a defendant death-eligible in Nevada.

Despite the weight of authority to the contrary, the State contends Nevada juries need not weigh aggravating and mitigating circumstances during the eligibility phase. Mot. at 11. The States cites Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015) for the proposition that a defendant's death-eligibility is "establish[ed]" "once the jury

determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt." Id. According to the State, the "second step" identified by the Nevada Supreme Court in Johnson—namely, the weighing of aggravating and mitigating circumstances—is actually "part . . . of the selection phase of the capital sentencing process." Id.

The State's reliance on Lisle is misplaced. In Lisle, the Nevada Supreme Court considered whether a "claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim [can] be based on a showing of new evidence of mitigating circumstances." 351 P.3d at 730-34. The Nevada Supreme Court ultimately narrowed the circumstances in which actual innocence arguments can be used as a gateway to reach a procedurally defaulted claim. Id. Specifically, while a capital habeas petitioner could show actual innocence of a death sentence by challenging a jury's finding regarding the existence of an aggravating circumstance, she or he could not offer new mitigation evidence to challenge a jury's determination regarding the weight of aggravating and mitigating circumstances. Id. The Nevada Supreme Court reasoned that to hold otherwise would not be "workable" because it "would allow the [actual innocence] exception to swallow the procedural bars" by permitting petitioners to constantly present new mitigation evidence through actual innocence arguments. Id. at 734. Lisle did not hold, as the State apparently maintains, that a jury's weighing of aggravating and mitigating circumstances is not part of the eligibility phase of the capital sentencing process. In fact, Lisle explicitly acknowledged that there is a "unique aspect of Nevada law that precludes the jury

from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances." Id. at 732.

The Nevada Supreme Court's analysis in Burnside v. State—a decision issued on the very same day as Lisle—confirms that Lisle did not change Nevada's requirements for death-eligibility. See 131 Nev. __, 352 P.3d 627 (2015). Burnside reviewed on direct appeal whether a capital defendant's death sentence survived the striking of an invalid aggravating circumstance on appeal. Id. at 646. In particular, the Nevada Supreme Court assessed whether the defendant could still be considered eligible for the death penalty in light of the stricken aggravator. Id. The Nevada Supreme Court concluded the defendant was still death-eligible, explicitly reasoning "the invalid aggravating circumstance would not have affected the jury's weighing of the aggravating and mitigating circumstances." Id. Burnside's reference to the weighing process when discussing the defendant's death-eligibility confirms that the weighing of aggravating and mitigating circumstances remains part of the eligibility phase of the capital sentencing process in Nevada. See id.[3]

B. Facts That Increase A Defendant's Statutory Maximum Punishment Are "Elements" Of The Crime That Must Be Proven By The State Beyond A Reasonable Doubt Under In Re Winship

As set forth below, the United States Supreme Court has interpreted In re Winship, 397 U.S. 358 (1970), to hold that a factual determination rendering a

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[3] Moreover, the Nevada Supreme Court's prior decisions in this case, especially its order in 2009 upholding his death sentence after striking two aggravators, make it clear that the weighing of aggravating and mitigating circumstances is a death-eligibility requirement. That the Nevada Supreme Court suggested in Lisle, six years later, that perhaps this was not the case cannot operate to override its prior decisions in this matter.

criminal defendant eligible for a sentence above the statutory maximum authorized by a guilty verdict alone effectively constitutes an "element" of the offense of conviction subject to various procedural protections under the Due Process Clause and the Sixth Amendment—namely, that it must be proven to a jury beyond a reasonable doubt.

Winship established that the Due Process Clause of the Fourteenth Amendment requires states seeking to convict a person of a crime to prove all "elements" of the offense "beyond a reasonable doubt." 397 U.S. at 361-62. In subsequent cases, the United States Supreme Court has also recognized an associated Sixth Amendment right to have a jury, not a judge, determine whether the "elements" of an offense, as defined by Winship, have been proven. See Jones v. United States, 526 U.S. 227, 248 (1999); McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

Over the past several decades, the United States Supreme Court has expanded the definition of an "element" subject to Winship's standard of proof and the associated right to a jury trial. Winship originally defined the elements of a criminal offense as "every fact necessary to constitute the crime" under state law. 397 U.S. at 364. Shortly afterward, however, the United States Supreme Court began to also treat facts affecting a defendant's maximum sentence for a crime as "elements" that had to be submitted to a jury and proven under the standard set forth in Winship. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (holding factual issue of whether a defendant who committed intentional homicide was guilty of manslaughter or murder was subject to Winship standard of proof because manslaughter carried

"substantially less severe penalties"); see also McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (recognizing that "in certain limited circumstances Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged").

The United States Supreme Court clarified this expansion of Winship in Apprendi v. New Jersey. 530 U.S. 466, 476 (2000). Apprendi concerned the constitutionality of a New Jersey sentence enhancement statute. Id. at 468-69. The statute increased the prison sentence of a defendant convicted for possession of a firearm for an unlawful purpose, if the sentencing judge found by a preponderance of the evidence that the defendant "'in committing the crime acted with a [biased] purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id. at 469 (quoting former N.J. Stat. Ann. § 2C:44-3(e)). The United States Supreme Court concluded the sentence enhancement statute contravened Winship because it only required that a finding of biased purpose be proven to a judge by a preponderance of the evidence. Id. at 495. Because a finding of biased purpose increased a defendant's statutory maximum sentence for the possession of a firearm for an unlawful purpose, it was "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Id. at 494 n.19 (emphasis added). Hence, the question of biased purpose was an "element" that had to be proven to a jury beyond a reasonable doubt. Id. at 491. Speaking more generally, the United States Supreme Court held that any "fact that [similarly] increases the penalty for a crime beyond the prescribed

statutory maximum" effectively constitutes an "element" that must be "submitted to a jury, and proved beyond a reasonable doubt" pursuant to Winship. Id. at 490.

Two years later in Ring v. Arizona, the United States Supreme Court applied these principles to the capital sentencing context. 536 U.S. 584, 586 (2002). Ring concerned the constitutionality of Arizona's capital sentencing scheme. Unlike Nevada, Arizona at the time was a non-weighing state, where a person could be found death-eligible merely if "at least one aggravating factor [wa]s found to exist [by a judge] beyond a reasonable doubt." Id. at 597 (internal quotation marks omitted).[4] Without this determination, Arizona statutes provided that the maximum penalty that a defendant could receive was life imprisonment. Id. The question presented in Ring was whether the existence of an aggravating factor was an "element" of the offense of conviction that had to be found by a jury, not a judge, under the Sixth Amendment. Id.[5] Applying Apprendi, the United States Supreme Court concluded the existence of an aggravating factor in Arizona was the "'functional equivalent of an element of a greater offense'" because it constituted "a fact[] increasing punishment beyond the maximum authorized by a guilty verdict standing alone"—namely, life imprisonment. Id. at 605, 609 (quoting Apprendi, 530 U.S. at 494 n.19).

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[4] Unlike Nevada, Arizona did not also require that the jury weigh the aggravating circumstance against mitigating circumstances to find the defendant death-eligible.

[5] Ring did not implicate the due process right to have the elements of an offense proven beyond a reasonable doubt because the Arizona statute already required that the aggravating factor be proven beyond a reasonable doubt. See Ring, 536 U.S. at 597.

Hence, the United States Supreme Court held that the existence of an aggravating factor had to be found by a jury, not a judge, under the Sixth Amendment. Id. at 609.

In short, the United States Supreme Court's precedents interpreting Winship establish that facts that increase a defendant's punishment beyond the statutory maximum authorized by a guilty verdict alone constitute elements of an offense that must be submitted to a jury and proven beyond a reasonable doubt. Ring in particular holds that the existence of an aggravating circumstance, when required for death-eligibility, is a "fact" that increases a defendant's statutory maximum punishment and is therefore an "element" subject to Winship's procedural protections.

C. Hurst Instructs That The Weighing Determination In Nevada Is A "Fact" That Increases A Defendant's Statutory Maximum Sentence And Is Therefore An "Element" Of The Offense Of Conviction

The Nevada Supreme Court repeatedly held prior to Hurst that the weighing determination was not a "fact . . . 'that increases the penalty for a crime beyond the prescribed statutory maximum,'" for purposes of Ring and Apprendi. Nunnery v. State, 127 Nev. 749, 771, 263 P.3d 235, 250 (2011) (quoting Apprendi, 530 U.S. at 490); see also McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009). The Nevada Supreme Court acknowledged that the weighing determination was a requirement for death-eligibility in Nevada and, thus, increased the statutory maximum punishment that a defendant could face. Nunnery, 127 Nev. at 772, 263 P.3d at 251. However, the Nevada Supreme Court characterized the weighing determination as "a moral determination rather than a factual determination," that "asks the sentencing body to balance facts that have already been found (aggravating

and mitigating circumstances) in order to reach a conclusion or judgment." Id. at 775, 263 P.3d at 253. Because it did not constitute a "fact" increasing defendants' statutory maximum punishment, the Nevada Supreme Court rejected a constitutional claim that the weighing determination had to be proven beyond a reasonable doubt under Ring and Apprendi. Id.

Hurst effectively overruled Nunnery. Hurst establishes that the weighing determination is a "fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." 136 S. Ct. 616, 620 (2016) (internal citation, alteration, and quotation marks omitted). Consequently, under Winship, Apprendi, and Ring, the weighing determination is an "element" of the offense of conviction that must be proven beyond a reasonable doubt.

In Hurst, the United States Supreme Court addressed the petitioner's constitutional challenge to Florida's capital sentencing scheme. At the time, Florida was a weighing state. Hence, like Nevada, Florida statutes required two distinct findings to render a defendant eligible for the death penalty: "[(1)] 'that sufficient aggravating circumstances exist' and [2] '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 622 (quoting former Fla. Stat. § 921.141(3)). Moreover, Florida statutes provided for a "hybrid" capital sentencing proceeding. Id. at 620. Under this "hybrid" scheme, a jury considering a capital case would first provide the trial judge with an "'advisory sentence' of life or death without specifying the factual basis of its recommendation." Id. (quoting former Fla. Stat. § 921.141(2)). Notwithstanding the jury's

recommendation, the trial judge would then independently determine whether Florida's two statutory requirements for death-eligibility had been satisfied and decide whether to impose a sentence of life imprisonment or death. Id. (citing former Fla. Stat. § 921.141(2)).

Hurst concluded Florida's "hybrid" system violated the Sixth Amendment because it required a judge, not a jury, to determine whether Florida's two death-eligibility requirements had been satisfied. The United States Supreme Court noted that under Florida statutes, "the maximum punishment . . . Hurst could have received without any judge-made findings [regarding his eligibility for the death penalty] was life in prison without parole." Id. at 622. Citing Apprendi, the United States Supreme Court also noted that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." Id. at 621 (quoting Apprendi, 530 U.S. at 494). Florida's system ran afoul of this principle because it required a trial judge alone to make the two eligibility findings that "increased Hurst's authorized punishment" beyond the statutory maximum punishment of life in prison. Id. at 622. In other words, Florida's system was unconstitutional because under Florida statutes, "[t]he trial court alone must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. (quoting former Fla. Stat. § 921.141(3)) (emphasis in original). Because a jury was constitutionally required to make both of these eligibility findings

to expose Hurst to a punishment beyond life in prison, the United States Supreme Court concluded Florida's death penalty scheme violated the Sixth Amendment. Id.

Hurst overruled Nunnery because Hurst held that a determination that mitigating circumstances do not outweigh aggravating circumstances, when required to impose a death sentence, must be proven to a jury beyond a reasonable doubt. 136 S. Ct. at 620. Hurst expressly found Florida's scheme defective under the Sixth Amendment because Florida statutes required a judge, not a jury, to determine both "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 622 (quoting former Fla. Stat. § 921.141(3)) (emphasis added). In other words, Hurst considered both the existence of an aggravating factor and the weighing determination to be "fact[s] that expose[] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id. at 620 (internal citation, alteration, and quotation marks omitted). Consequently, Hurst instructs that the weighing determination, when required for death-eligibility, is an "element" of the offense of conviction that is subject to the Sixth Amendment jury right and, by extension, to Winship's beyond-a-reasonable-doubt standard of proof.

The State attempts to cabin Hurst's holding, arguing that Hurst, like Ring, merely held that a jury must determine whether an aggravating circumstance existed. Mot. at 10-11. The State suggests Hurst did not hold that a jury was also required to engage in the weighing determination. Id. Hence, the State argues Hurst did not consider Florida's second eligibility requirement—the weighing

determination—to be a "fact" increasing a defendant's statutory maximum punishment that had to be submitted to a jury. Id.

The plain language of Hurst belies the State's argument. The United States Supreme Court in Hurst repeatedly stated Florida's death penalty scheme was defective because it required a judge, rather than a jury, to determine both of the eligibility findings necessary to impose a death sentence under Florida law. Speaking in the plural, Hurst stated Florida's death penalty scheme was unconstitutional because it "does not require the jury to make the critical findings necessary to impose the death penalty" and that "Florida requires a judge to find these facts." Hurst, 136 S. Ct. at 622 (emphasis added). Moreover, the United States Supreme Court expressly faulted Florida's death penalty scheme for requiring that "[t]he trial court alone must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. (quoting former Fla. Stat. § 921.141(3)) (emphasis in original). Such language shows Hurst considered both of Florida's death-eligibility requirements to be "fact[s] that expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id. at 620 (internal citation, alteration, and quotation marks omitted). Consequently, Hurst holds that the weighing determination, when required by a state for death-eligibility, is an "element" of the offense of conviction that is subject to the Sixth Amendment jury right and, by extension, to Winship's beyond-a-reasonable-doubt standard of proof.

D. Mr. Witter's Death Sentence Must Be Vacated Because His Jury Was Not Instructed That The Weighing Determination Had To Be Proven By The State Beyond A Reasonable Doubt

As set forth in Section IV.C., Hurst holds that the weighing determination in Nevada is an "element" of the offense that the State must prove to a jury beyond a reasonable doubt. As a result, Mr. Witter's death sentence must be vacated. At Mr. Witter's 1995 capital trial, the trial court instructed the jury to "impose a sentence of death only if it finds . . . that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." See Penalty-Phase Instruction No. 8. However, the trial court failed to instruct the jury that it could only impose a death sentence on Mr. Witter if it concluded the State had proven this fact beyond a reasonable doubt. The trial court's error was structural because it pertained to the burden of proof required to establish an element of Mr. Witter's offense under Winship. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (holding trial court's failure to properly instruct jury regarding prosecution's burden of proving an element of the offense beyond a reasonable doubt constituted structural error).

Moreover, Hurst holds that the trial court's error was not cured by the Nevada Supreme Court's subsequent reweighing of the aggravating and mitigating circumstances during Mr. Witter's proceedings on July 22, 1996 and October 20, 2009. In its 1996 decision, the Nevada Supreme Court struck one of Mr. Witter's four aggravators as legally invalid. Witter v. State, 112 Nev. 908, 930, 921 P.2d 886, 901 (1996) abrogated on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). However, after reweighing the remaining three aggravators against the mitigation evidence, the Nevada Supreme Court concluded "Witter's sentence of

death is still proper." Witter, 112 Nev. at 930, 921 P.2d at 901. In its 2009 decision, the Nevada Supreme Court struck two of three remaining aggravators as legally invalid. Witter v. State, 281 P.3d 1232, at *2-*3 (Nev. 2009) (unpublished). However, after reweighing the sole remaining one aggravator against the mitigation evidence, the Nevada Supreme Court concluded "the jury would have selected the death penalty." Id. Under Hurst, the Nevada Supreme Court's reweighing did not cure the trial court's original error on two grounds. First, in its 1996 decision, the Nevada Supreme Court did not apply Winship's beyond-a-reasonable-doubt standard when reweighing Mr. Witter's death eligibility, effectively repeating the error committed by the trial court. Second, and more importantly, the Nevada Supreme Court's reweighing of Mr. Witter's death-eligibility was constitutionally inadequate twice because Hurst established that the weighing determination must be conducted by a jury, rather than a judge, under the Sixth Amendment. Hurst, 136 S. Ct. at 622. Hence, the Nevada Supreme Court's reweighing of Mr. Witter's death-eligibility did not cure the trial court's original structural error.

Accordingly, Mr. Witter's death sentence must be vacated.

V. HURST APPLIES RETROACTIVELY

The State argues that, even if Hurst holds that the weighing determination is an "element" of the offense of conviction that must be proven by the State beyond a reasonable doubt, Hurst does not apply retroactively to the judgment against Mr. Witter. Mot. at 9-10. The State contends Hurst is a mere application of Ring v. Arizona and cannot apply retroactively under the standard set forth in Teague v.

Lane, 489 U.S. 288 (1989). Id. In support, the State notes the United States Supreme Court held in Schriro v. Summerlin, 542 U.S. 348 (2004), that Ring is not retroactive. Id. As set forth below, the State's argument is meritless.

A. Legal Standard

The United States Supreme Court's decision in Teague sets forth a framework for determining when a new rule of constitutional law applies to cases on federal collateral review. Under Teague, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity. First, "[n]ew substantive rules generally apply retroactively." Schriro v. Summerlin, 542 U.S. 348, 351 (2004). Substantive rules include rules that "alter[] the range of conduct or the class of persons that the law punishes" or "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Id. at 352, 354 (internal citation and quotation marks omitted). Second, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. Saffle v. Parks, 494 U.S. 484, 495 (1990). To have retroactive effect, the procedural rule "must be one without which the likelihood of an accurate conviction is seriously diminished." Schriro, 542 U.S. at 353 (emphasis omitted).

The Nevada Supreme Court has described Teague's framework as "strict[]" and "severe[]." Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 471 (2002). Hence, the Nevada Supreme Court has chosen "to adopt [Teague] with some qualification," when assessing whether new rules of constitutional law apply retroactively to cases on state collateral review. Id. Under the Nevada Supreme Court's more relaxed retroactivity approach, new procedural rules need not be of "watershed" significance to merit retroactive application, as they must under Teague. Id. at 820, 59 P.3d at 472. Instead, if the accuracy of the proceedings is "seriously diminished" without the rule, the rule will apply retroactively to cases on state collateral review, whether or not they are of "watershed" importance. Id.

B. Hurst Announced A New Rule That Applies Retroactively

Hurst announced a new rule of constitutional law: namely, that a determination that mitigating circumstances do not outweigh aggravating circumstances, when required by a state for death-eligibility, is an "element" of the offense of conviction that must be proven beyond a reasonable doubt pursuant to Winship. Whether this new rule is framed as a "substantive rule" or a "procedural rule," it applies retroactively to Mr. Witter under the standards articulated in Colwell and Teague.

The United States Supreme Court has applied Winship's beyond-a-reasonable-doubt standard retroactively in two decisions pre-dating Teague: (1) Ivan V. v. City of N.Y., 407 U.S. 203 (1972); and (2) Hankerson v. North Carolina, 432 U.S. 233

(1977).[6] In both of these decisions, the United States Supreme Court considered whether Winship and subsequent decisions expanding its scope should apply retroactively based on the pre-Teague standard for retroactivity set forth in Linkletter v. Walker, 381 U.S. 618 (1965). Retroactive application of new rules under the Linkletter standard was based on considerations similar to those later set forth in Teague. Under the Linkletter standard, a new rule was to be applied retroactively if the purpose of the new rule was "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." Williams v. United States, 401 U.S. 646, 653 (1971). In Ivan V. and Hankerson, the United States Supreme Court applied this pre-Teague standard and concluded Winship and subsequent decisions expanding its scope should apply retroactively.

First, in Ivan V., the United States Supreme Court held that Winship's beyond-a-reasonable-doubt standard applied retroactively to juvenile delinquency cases where conviction by the fact-finder was not predicated upon the prosecution's burden to prove the elements of a crime beyond a reasonable doubt. Ivan V., 407 U.S. at 203-04. Retroactive application of the Winship standard was warranted in these cases because it "overc[a]me an aspect of a criminal trial that substantially impairs the truth-finding function." Id. at 204. The United States Supreme Court described Winship's beyond-a-reasonable-doubt standard as "a prime instrument for reducing

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[6] Neither of these decisions has been overruled by Teague or its progeny.

the risk of convictions resting on factual error." Id. Because it required that "no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt," the United States Supreme Court stated the Winship standard "provide[d] concrete substance for the presumption of innocence." Id. at 204-05 (internal citation and quotation marks omitted). The Winship standard was so fundamental to the administration of justice that the United States Supreme Court described it as the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Id. (internal citation and quotation marks omitted). Hence, the United States Supreme Court retroactively applied the Winship standard. Id.

Second, in Hankerson, the United States Supreme Court retroactively applied an extension of the Winship standard set forth in Mullaney v. Wilbur, 421 U.S. 684 (1975). See 432 U.S. at 242. In Mullaney, the United States Supreme Court had held that Winship's beyond-a-reasonable-doubt standard applied to more than just the facts necessary to constitute a crime under state law. 421 U.S. at 698. Instead, facts increasing a defendant's possible sentence, such as whether the defendant was guilty of manslaughter or murder, also constituted "elements" of the offense that had to be proven beyond a reasonable doubt under Winship. Id. (holding factual issue of whether a defendant who committed intentional homicide was guilty of manslaughter or murder was subject to Winship standard of proof because manslaughter carried "substantially less severe penalties"). In Hankerson, the United States Supreme Court applied the Mullaney rule retroactively because it was "designed to diminish

the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 432 U.S. at 242.

Ivan V. and Hankerson demonstrate that the new rule set forth in Hurst must be applied retroactively under Colwell and Teague, either as a substantive rule or as a procedural rule. First, the new rule set forth in Hurst applies retroactively as a "substantive rule" because it lessens the "risk that a defendant . . . faces a punishment that the law cannot impose upon him." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016), as revised (Jan. 27, 2016) (internal citation and quotation marks omitted). Like the new rules applied retroactively in Ivan V. and Hankerson, Hurst's new rule applies Winship's beyond-a-reasonable-doubt standard to a context it had not previously been applicable and therefore "reduc[es] the risk of [a death sentence] resting on factual error." Ivan V., 407 U.S. at 204. Moreover, the application of the Winship standard to the weighing determination also excludes certain individuals from a death sentence who would otherwise be found death-eligible based on a lesser standard of proof. See Montgomery, 136 S. Ct. at 728, 734. Consequently, the new rule in Hurst applies retroactively as a substantive rule.

Second, the new rule set forth in Hurst must also apply retroactively as a procedural rule. As noted previously, under the Nevada Supreme Court's retroactivity test, a new procedural rule need not be a "watershed" rule to apply retroactively: the only requirement for retroactive application is that "accuracy [would be] seriously diminished without the rule." Colwell, 118 Nev. at 820, 59 P.3d

at 472. Ivan V. and Hankerson demonstrate that the new rule set forth in Hurst meets this standard. Ivan V. and Hankerson retroactively applied Winship and subsequent extensions of Winship. The United States Supreme Court's holdings in both cases were premised on the principle that Winship's beyond-a-reasonable-doubt standard was designed to uphold the "truth-finding function" of criminal trials and to "diminish the probability that an innocent person would be convicted." 432 U.S. at 242. As an extension of Winship, Hurst's new rule similarly enhances the accuracy of criminal trials by "reducing the risk of [a death sentence] resting on factual error." Ivan V., 407 U.S. at 204. Accordingly, Hurst's new rule must be applied retroactively as a procedural rule under Colwell. See Powell v. State, No. 310, 2016, 2016 WL 7243546, at *5 (Del. Dec. 15, 2016) (retroactively applying extension of Winship's beyond-a-reasonable-doubt standard to weighing determination required for death-eligibility).

C. Schriro v. Summerlin Is Inapposite

The State argues Hurst is a mere application of Ring and cannot apply retroactively under Teague. Mot. at 9-10. In support, the State notes the United States Supreme Court held in Schriro v. Summerlin, 542 U.S. 348 (2004) that Ring is not retroactive. Id. The State's reliance on Schriro is misplaced. As set forth in Section II.A., Hurst is not a mere application of Ring. Hurst addressed an issue that Ring did not—namely, whether a determination regarding the weight of aggravating and mitigating circumstances constitutes an "element" of the crime that must be proven by the State beyond a reasonable doubt under Winship.

More importantly, the United States Supreme Court's decision in Schriro addressed only the retroactivity of Ring's holding that a jury, not a judge, must find the existence of an aggravating circumstance. See Schriro, 542 U.S. at 356. The United States Supreme Court concluded this holding did not apply retroactively to cases on federal collateral review under Teague because it constituted a new procedural rule that was not a "watershed rule[] of criminal procedure." Id. (internal citation and quotation marks omitted). The United States Supreme Court reasoned that Ring's holding was not a "watershed rule" because the United States Supreme Court could not "confidently say that judicial factfinding," as opposed to factfinding by a jury, "seriously diminishes [the] accuracy" of capital sentencing. Id. (emphasis in original). In fact, "reasonable minds continue to disagree over whether juries are better factfinders [than judges] at all." Id. (emphasis in original). Given the lack of evidence as to whether juries were more accurate fact-finders than judges, the United States Supreme Court declined to apply Ring retroactively.

Mr. Witter's constitutional claim, on the other hand, concerns not the identity of the factfinder, but the standard of proof that the factfinder must apply when determining death-eligibility in Nevada. While the factfinder's identity may not affect the accuracy of capital sentencing proceedings, the application of a beyond-a-reasonable-doubt standard of proof is central to the truth-finding function of criminal trials. Indeed, as set forth above in Section IV.B., the United States Supreme Court has long recognized that Winship's beyond-a-reasonable-doubt standard of proof "is a prime instrument for reducing the risk of convictions resting on factual error"

because it "provides concrete substance for the presumption of innocence." Ivan V., 407 U.S. at 204-05 (internal citation and quotation marks omitted); see also Hankerson, 432 U.S. at 243-44. In short, unlike the right to a jury trial discussed in Schriro, Winship's beyond-a-reasonable-doubt standard, by its very nature, guarantees accuracy in criminal proceedings. Consequently, Hurst's extension of Winship merits retroactive application. See Powell, 2016 WL 7243546, at *3 (holding Hurst retroactive and distinguishing Schriro as "only address[ing] the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof"); Guardado v. Jones, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (holding Hurst can apply retroactively despite Schriro because Schriro "did not address the requirement for proof beyond a reasonable doubt").

Accordingly, Hurst applies retroactively and supports Mr. Witter's claims for relief in the instant Petition.

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VI. CONCLUSION

Mr. Witter requests this Court: (1) deny the State's Motion to Dismiss his Petition for Writ of Habeas Corpus; and (2) order the State to answer his claims.

DATED this 8th day of March, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Michael Pescetta
MICHAEL PESCETTA
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
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Assistant Federal Public Defender

CERTIFICATE OF MAILING

In accordance with EDCR 7.26(b)(6), the undersigned hereby certifies that on the March 8, 2017, a true and accurate copy of the foregoing OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS was filed electronically with the Eighth Judicial District Court and served by depositing same in the United States mail, first-class postage prepaid, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Stephanie Young
An Employee of the
Federal Public Defender
District of Nevada

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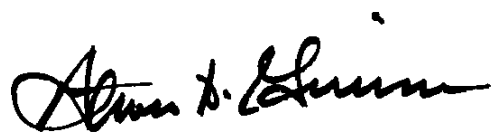

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 94C117513 DEPT NO: IV

REPLY TO OPPOSITION
DATE OF HEARING: 4/19/17
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits this Reply to Opposition.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

Defendant's sole allegation of good cause for overcoming the procedural default bars is that Hurst established a new rule of constitutional law not previously available and is retroactively applicable. *See* Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). Specifically, Defendant argues that "Hurst held that the weighing determination constitutes an 'element' of the crime that the State must prove to a jury beyond a reasonable doubt under

the Due Process Clause of the Fourteenth Amendment to the Constitution." Opposition, p. 17. This is false. It is one thing to argue for an extension of law based on existing precedent, but quite another to misrepresent the holding of a case. Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

The United States Supreme Court itself, summarized its holding in Hurst in the first two paragraphs of the opinion thusly:

> A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
>
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst, 136 S.Ct. at 619. Hurst does not cite to Winship or the reasonable doubt standard because it's holding only concerns the identity of the fact finder, not the standard of proof. The holding of Hurst is founded upon the Sixth Amendment right to a jury, not the Fourteenth Amendment Due Process requirement for proof beyond a reasonable doubt. Hurst is silent on that issue. On remand, the Florida Supreme Court interpreted Hurst as simply requiring that all critical findings necessary to imposition of the death penalty must be found by the jury, not the judge. Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) ("In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances"). After Hurst, Florida now requires all necessary findings to be made by a jury rather than a judge, but still only applies the reasonable doubt standard to the existence of the aggravating factors, not the weighing. Id. In Defendant's case, a jury made all necessary findings for the death penalty, including weighing, in full compliance with Hurst, which is nothing more than an application of Ring. Accordingly, Hurst does not represent an intervening change in law which can overcome the procedural default.

Several courts have rejected the same argument presented by Defendant and held that Hurst cannot be "stretched" so far as to conclude that the reasonable doubt standard applies to the weighing process:

> Hurst does not mention the weight a jury should give to the aggravating and mitigating factors, as it is concerned with whether a judge may take over the jury's role in determining these factors. The Petitioner's claim does not deal with that specific issue, and his attempt to link Hurst to his case stretches the holding too far. As such, the court finds that Hurst does not represent an intervening change in the law . . . .

Runyon v. United States, No. 4:15cv108, 2017 U.S. Dist. LEXIS 15886, at *144-45 (E.D. Va. Jan. 19, 2017); *see also* Davila v. Davis, 650 Fed.Appx. 860, 872-73 (5th Cir. 2016) (on appeal of district court's rejection of argument that Texas' death penalty statute was "unconstitutional … because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt" the Court concluded that "[r]easonable jurists would not debate the district court's resolution, even after Hurst."); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive a defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of the aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance … has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. … Nothing in Hurst … affects our conclusions in this regard."); Ex parte Bohannon, 2016 Ala. LEXIS 114, p. 15 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio-8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Defendant's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. The United States Supreme Court allowed the rejection of Defendant's argument by the California and Alabama Supreme Courts to stand. If the High

Court intended the overbroad view of Hurst suggested by Petitioner certiorari would have been granted to give guidance to the lower courts.

Every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating and mitigating circumstances—seven circuits so far—has rejected it, reasoning that the weighing process constitutes not a factual determination, but a complex moral judgment. *See* United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005). Under Defendant's interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published more than a year ago. The fact that not one of these leading cases on the issue was even mentioned by the Court in Hurst or since been overruled belies Defendant's assertion that Hurst addressed such an issue.

Nor did the Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985). The Court has repeatedly recognized that the purpose of weighing is to protect a defendant's Eighth Amendment right to an individualized sentencing determination and is a moral judgment that goes to sentence selection, not eligibility. *See*, e.g., Boyde v. California, 494 U.S. 370, 376-77, 110 S. Ct. 1190, 1196 (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."). Defendant has misinterpreted and misrepresented the holding of Hurst.

Perhaps the strongest reason to reject Defendant's dubious construction of Hurst is how the Supreme Court dealt with its own precedent in Hurst. Hurst cited Walton without

overruling it. Hurst, 577 U.S. at __, 136 S.Ct. at 622. This is telling because Defendant's view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances is in direct conflict with Walton:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, *a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances* sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650, 110 S.Ct. 3047, 3055 (1990) (emphasis added). If the United States Supreme Court intended the holding Defendant attributes to Hurst, the Court would have addressed this direct conflict. Indeed, where Walton conflicted with Ring the United States Supreme Court squarely addressed the issue and overruled Walton in part. Ring, 536 U.S. at 609, 122 S.Ct. at 2443 ("we overrule Walton to the extent that it allows a sentencing judge … to find an aggravating circumstance necessary for imposition of the death penalty.").

Under Nevada law, weighing is only part of death "eligibility" to the extent a jury is precluded from imposing death if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstances. Lisle v. State, 131 Nev. ___, 351 P.3d 725, 732 (2015). But this does not mean that weighing is part of the narrowing aspect of capital punishment the same as aggravating circumstances. Id. Instead, weighing, by definition, is part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the "selection" phase of the capital sentencing process. Id. Defendant ignores that Nevada's use of the term, "eligibility," unlike the federal courts, has historically referred to both narrowing and individualized selection. Id. A State Supreme Court's interpretation and construction of its own state statutes is binding on all federal courts. *See* e.g., Ward v. Illinois, 431 U.S. 767, 772-73, 97 S. Ct. 2085, 2089 (1977); Hortonville Joint Sch. Dist. v. Hortonville Educ. Asso., 426 U.S. 482, 488, 96 S. Ct. 2308, 2312 (1976). Defendant is not at liberty to re-interpret Nevada statutes in a manner inconsistent with the Nevada Supreme Court's own interpretation.

Notably, the Apprendi line of cases expressly acknowledge that they have no effect on sentence selection. *See*, e.g., Cunningham v. California, 549 U.S. 270 (2007) ("Other States

have chosen to permit judges genuinely 'to exercise broad discretion … within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal.") [internal citations omitted]. This is further supported by the expressly limited nature of Hurst's overruling of Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst only overrules Spaziano and Hildwin "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," and that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 136 S.Ct. at 624. But in Spaziano, the Supreme Court also held that the Sixth Amendment right to trial by jury has no effect on sentence selection. Spaziano, 468 U.S. at 459-62. That holding from Spaziano remains undisturbed after Hurst, and Hurst thus has no impact on the weighing process that is part of the sentence selection process in Nevada.

Finally, even if Hurst applies retroactively and requires application of the beyond a reasonable doubt standard to the weighing of mitigation against aggravation, any instructional error would have been nothing more substantial than harmless error and thus could not support a finding of prejudice to ignore Petitioner's procedural defaults. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. Constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001). The record in this matter meets the Chapman standard.

Defendant has failed to show that Hurst means what he claims it means or that it is retroactively applicable. At most, Defendant is using Hurst to advocate for an extension of law. Accordingly, Hurst itself does not represent any kind of intervening case law which can provide Defendant with good cause for his untimely and successive habeas petition.

As to the finality of the Judgment of Conviction, Witter argues the "amended" judgment was not valid because it imposed restitution in an uncertain amount. However, this argument does not work for the original judgment filed on August 4, 1995, which neither determined that restitution was appropriate nor left an amount of restitution uncertain. This was a final judgment as soon as it was entered. Witter's reliance upon court minutes to suggest that the original judgment was always intended to include an award of restitution, cannot alter the plain language of the original judgment itself which did not. Witter's argument must be that when the court subsequently filed an amended judgment which imposed restitution in an uncertain amount, it had the effect of undoing the finality of the original judgment. None of Witter's authority and case law hold that an amended judgment can somehow render a previously final judgment, un-final for purposes of the habeas default rules.

Dated this 22nd day of March, 2017.

Respectfully submitted,

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BY */s/ Steven S. Owens*
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Reply to Opposition, was made this 22nd day of March, 2017, by Electronic Filing to:

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SSO//ed

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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM L. WITTER, Defendant.	CASE NO.: 94C117513 DEPT. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

WEDNESDAY, APRIL 19, 2017

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION

DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: DAVID ANTHONY, ESQ.
TIFFANY L. NOCON, ESQ.
Assistant Federal Public Defenders

RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, APRIL 19, 2017 at 10:53 A.M.

THE RECORDER: Page 16, C117513; Witter.

THE COURT: All right, so it's State of Nevada -- its Witter versus State of Nevada, C -- you know 117513. It's a motion to dismiss the 4th habeas petition. There's a petition for habeas corpus and there's a motion to dismiss it and then I have a reply and opposition as well.

Good morning, everyone; if you want to introduce yourself for the record.

MR. ANTHONY: Good afternoon, Your Honor, David Anthony from the Federal Public Defender for William Witter who's in custody.

THE COURT: Okay.

MR. ANTHONY: You want to introduce yourself?

MS. NOCON: Oh, Tiffany Nocon also from the Federal Public Defenders Office on behalf of Mr. Witter.

MR. OWENS: Your Honor, Steve Owens for the State.

THE COURT: Okay, so there's a couple of claims brought up. One of the first issues brought up was the timeliness issue. And I know that the State's position is that it's untimely and that we'd go off the original judgment of conviction. I'll be frank with you, I went through and I looked at *Slaatte versus State* and *Whitehead versus State* and I would tend to agree with the Defense that the way those cases are -- well, the way the holding came out in those particular cases, that unless there's a JOC that I didn't see, that it would be timely. It looks like that last judgment of conviction, although it does set a restitution amount, it also says an additional amount to be determined at a later

date. I don't show where there's been any additional judgments of conviction subsequent to that second one.

MR. OWENS: You know I'll be happy to address that.

THE COURT: And the other thing I want to address is I know that the case law says if it appears to be clerical, but I don't think that the -- but I don't think that it's a clerical matter because when you look at the first judgment of conviction it sets forth the sentence on the murder charge. The second judgment of conviction, it not only sets forth the sentence for the murder charge, it also sets forth the sentence on the additional counts on which the Defendant was convicted, so I just don't see where that could be clerical in nature. I mean I understand -- not being there, my guess is probably it was just inadvertently left out. But on its face, I don't think that you can find that its -- I don't think the Court can find that it's clerical in nature. So unless you have something I don't know, it appears that everything is timely by the Defense.

MR. OWENS: I was under the impression that the original judgment had sentenced on everything --

THE COURT: Let me look at it.

MR. OWENS: -- other than the amended just came in and sentenced -- and added some restitution in.

THE COURT: Let me look at it. Judgment of Conviction; the original one's '95. No, it doesn't. If you look at it, you go through and there's no -- it sentences on the murder. It doesn't sentence on the other ones. Do you see it, the August 4th, 1995 judgment of conviction?

MR. OWENS: Yeah, I'm looking at the August 4th one right now. Well, I -- you know I would say that unlike those other cases that the Defense has

cited where they were remanded because it was improper to take an appeal because the court said those aren't -- that's not a final judgment, it leaves an amount uncertain of restitution. Here we had a direct appeal. It was treated as a final judgment.

THE COURT: Yeah, and -- but the appeal was obviously subsequent to the Court's clarification in the *Slaatte* and the *Whitehead* case.

MR. ANTHONY: And the other thing that I might add, Your Honor, is is that really the conduct of the parties can't confer appellate jurisdiction on the Nevada Supreme Court. That's why they dismissed the appeal in the *Slaatte* case is that jurisdiction either exists or it doesn't and it's not something that can be conferred by the parties, so.

THE COURT: All right, my guess is it was just never raised previously. You know it's never been --

MR. OWENS: Well, if the Court's telling me that after this many years they can go and find a defect like this and it's not procedurally barred, and even though there was a direct appeal with issuance of a remittitur and you're telling me that this case was never final all along and we got to redo a capital case, there's been no other published --

THE COURT: That's not what I'm telling you at all. What I'm telling you is -- you know honestly, if I read between the lines, my guess is what happened is -- I don't have access to what happened you know twenty plus years ago; okay? My guess is probably she -- he was sentenced on everything at the original hearing date and the judgment of conviction inadvertently did not include the sentence for all the other counts, but that's just me guessing. All I can see is I have a judgment of conviction that convicts him -- that sentences --

adjudicates him on the murder charge. Then I have a subsequent judgment of conviction that comes along not too long later and adds a sentence for all the other charges on which the Defendant was convicted. In addition, it adds a restitution amount with the additional *caveat* to be determined; okay? When you look at the subsequent -- the case law that's come along, what, 15, 20 years later, I think the Supreme Court was pretty clear that for purposes of determining timing issues, and I say timing issues and that's for post-conviction relief, that if there's an open issue in that judgment of conviction the -- its not final and that doesn't start the timing -- the timing doesn't start to run. That's all I'm saying. I'm not saying you're going to redo this murder case.

MR. OWENS: Okay.

THE COURT: So, that -- where that comes into play in this case is if those cases had not come out I think the State would have a very good argument that its time barred. I mean quite simply there's been many, many, many years passed since remittitur on the direct appeal, remittitur on the post-conviction petition for habeas corpus, but you know those cases came out and I don't know any other way to reconcile them.

MR. OWENS: I see what Your Honor is saying now. So, if --

THE COURT: So that would mean we go into the merits.

MR. OWENS: Well, there's still a successive petition bar. This is -- there's been -- this is, what, the fourth petition bar? It has nothing to do with time. It has to do with the number of petitions that have been filed regardless of whether or not they're still timely and that the one year time bar never started ticking. This is their fourth habeas petition. Their last one was procedurally

barred because it was successive. I don't think that argument gets them around the successive petition bar and being here today on a fourth. So, I think we still have bars.

But let me jump to the merits on the *Hurst* issue because really, yeah, we have raised procedural bars. Those are mandatory. The Court's got to deal with those. But the merits of the *Hurst* issue to me is very simple. I don't see how any reasonable attorney can go read the *Hurst* case and come out of it with the interpretation that the Federal Public Defender has. I guess reasonable minds can disagree about just about anything, but I haven't found any court anywhere in the country that has attributed to it the interpretation that they have.

They've got a case from back east that I've gone and read and, yeah, there's a court there and there's a few other courts elsewhere that have applied the beyond a reasonable doubt standard to the weighing of aggravating and mitigators, but their case -- is it Delaware?

MR. ANTHONY: Delaware; correct.

MR. OWENS: My reading of that case is that part of their opinion was not in any way premised upon the *Hurst* decision 'cause *Hurst* doesn't say that and they didn't rely on *Hurst* for coming up with that part of their ruling. They based that on Delaware state law and the interpretation of other cases. And there's a few other jurisdictions that do the weighing beyond a reasonable doubt but it's not based on *Hurst*. So, I just fundamentally disagree with them on *Hurst*.

If Your Honor wants to reach the merits of that as an alternative decision if overcoming the one year time bar, they still have to show prejudice

and *Hurst* does not give them the relief and remedy that they're looking for if it did. We're talking about almost every death sentence in the country would be overturned. And here we are more than a year since *Hurst* publication; nobody's interpreted *Hurst* that way and overturned a death sentence based on *Hurst* saying that, oh, you didn't use the beyond a reasonable doubt standard on the weighing of aggravating and mitigators. There's tons of federal cases out there that have looked at this issue and said you don't have to do weighing beyond a reasonable doubt. I cited to all these circuits that have looked at this issue and none of those cases were addressed by the court in *Hurst*. None of them were overturned in *Hurst*. The argument they've got, if they're right, it would be astronomically devastating to the death penalty across the country. And the fact that it's not belies that they've got an issue here.

I don't know what else to say on it. I -- they filed this in 20 different death penalty cases here in Clark County and we're going in one by one and ticking them off. We're [indiscernible]. Judge Cadish has denied this in two capital cases. You're the third judge to look at this issue as far as I am aware. Jonathan Vanboskerck might have had it.

THE COURT: You know I actually had this issue on calendar twice today in a pending case and in this case.

MR. OWENS: Okay. Well, I obviously don't have them all. I've got 20 of them myself and you'd be the third one in my stack. The issue's floating around out there. I'm not aware of anyone granting them relief so far. They may yet get relief. But that's where we're at with this and if you have further questions I'll be happy to answer but they -- my brief covers everything else I wanted to say.

THE COURT: I tend to agree with the State upon reading *Hurst*. I just don't see how you got to the position you have.

MR. ANTHONY: Could --

THE COURT: I mean *Hurst* does repeatedly reference *Ring* which was many, many years prior. And I just don't -- looking at the facts of *Hurst* I just even know how you're applying them to this situation because as in this -- I'm sorry, I'll let you argue.

MR. ANTHONY: Well, first of all, Your Honor, one of the things that I think is unique about the *Hurst* decision, and I'm looking at section 2 of the decision. I'm sure at this point we've all read it probably several times.

THE COURT: Yes.

MR. ANTHONY: The court refers to findings plural and they refer to two different sets of findings: one regarding the existence of the aggravating circumstances and one finding regarding the weighing of the aggravating circumstances against the mitigation. Now, the reason that I believe that our reading of *Hurst* is supportable is because that's exactly the reading of *Hurst* that the Florida Supreme Court adopted on remand in the *Hurst* case. Mr. Owens notes that Delaware also took the same route in the *Rauf* case. Not only did they do that, in the follow up case, in *Powell*, they did apply the reasonable doubt standard exactly the way that we're asking the Court to do so and they completely emptied Delaware's death row. So, if the question is there's no court anywhere that hasn't done this, well there is. There is a state and they completely emptied their death row. There's a very similar situation that appears to be occurring in Florida as a result of this as well, so.

THE COURT: Okay, so obviously the different states can choose to

obviously not be inconsistent with the U.S. Supreme Court but they can go over and beyond what's mandated by the U.S. Supreme Court which, --

MR. ANTHONY: Correct, Your Honor.

THE COURT: -- in these particular jurisdictions, it sounds like some states have made that decision to go over and beyond what's mandated by the Nevada Supreme Court -- I'm sorry, the U.S. Supreme Court. However, there is -- the State is correct, there is a whole bunch of cases -- I mean it was a whole bunch of jurisdictions that have not gone over and beyond what was mandated by the U.S. Supreme Court in *Hurst* and the cases from those states are not being overturned as being inconsistent with *Hurst*.

MR. ANTHONY: Could I address that aspect --

THE COURT: Yes, please.

MR. ANTHONY: -- of it, Your Honor?

Again, I think the State has done an admirable job of collecting, you know the way that different states have handled this. The one thing that I would comment to the Court about that is that it varies state by state.

THE COURT: Okay.

MR. ANTHONY: And a lot of times -- for example, the State cites to the California system but California doesn't have a system where you weigh aggravating and mitigating factors. It's not a weighing state. So, the way that I would address the Court's concern is that there are state systems that don't do this. There are different state systems like in Texas there's no weighing at all. You just answer a list of questions. So, I'm not saying that *Hurst* has application in every state.

What I am saying is that in a state like Nevada where you have

what I would consider a three-step process, the first step being the finding of the aggravating circumstances, the second step being the weighing of the aggravating circumstances, and only then can you get to the third step where you can consider other matter evidence or the jury can decide to extend mercy, my argument, Your Honor, is is that if you look at the unique way that the capital sentencing scheme is set up in Nevada that's what differentiates Nevada from a place like California or a place like Arizona where once the jury finds the aggravating circumstance they're basically done as far as finding the Defendant eligible for the death penalty.

So, while I agree that the State has definitely cataloged and brought forward a lot of the ways different states have gone, and there are different states that have gone in different directions, my argument is that our system is very, very similar to Florida's which is they have the finding of the aggravators and then the weighing of the aggravators against the mitigators. And so, I would certainly agree with their point that this doesn't have an effect in every state on every capital punishment system but I believe it does in Nevada based upon the way that the Legislature has basically set out this capital sentencing scheme. So, that's the way that I would distinguish the cases that Mr. Owens cited. And a lot of those cases from the federal system also pre-date *Hurst*.

And so, I think that in light of *Hurst* I think that there is certainly a movement that I see, the opposite direction, mostly by the Florida Supreme Court, also by the Delaware Supreme Court. Maybe this is something that ultimately needs to go to the Nevada Supreme Court obviously to speak to this because the Nevada Supreme Court decided the *Nunnery* decision which is kind of what we're kind of up against. That's the difficulty that we face. But that's

the same thing that occurred in Delaware and Florida. They had adverse authority. *Hurst* came out. They interpreted *Hurst* to apply to the weighing stage in their state and we would just ask that that same consideration apply to Nevada based on the way the statute is set up.

THE COURT: Okay.

Anything else from the State?

MR. OWENS: Well, any time we're dealing with the death penalty it gets real political and I perceive that's what happened in Delaware. Many jurisdictions are looking at the death penalty. The Legislature is looking at the death penalty. But here, Nevada has looked at the issue in terms of what the policy is here in Nevada and whether weighing applies to the aggravating and mitigating circumstances or beyond a reasonable doubt standard applies and they said it doesn't. Granted, they haven't revisited that decision in light of *Hurst*, but *Hurst* doesn't give you any reason to overturn that published case law that is against them. The Nevada jurisprudence on the death penalty is whatever the Nevada Supreme Court says it is. And if there's any confusion in the case law it's because of federal counsel coming in and trying to compare us to other jurisdictions like Florida and saying, no, Nevada, this is what your system is. They have no grounds or standing to come in and tell us in Nevada what our own death penalty statutes mean and what they don't mean. We're free to interpret them, the Nevada Supreme Court is, any way we want to. We can say black is white. And so they get caught up on these words that, oh, you called this an eligibility factor, you called this a selection. Our Nevada Supreme Court has used those terms in different ways than what federal counsel used to from the U.S. Supreme Court but -- and so we have a

fundamental disagreement. They don't agree with how Nevada has itself defined the factors for aggravating and mitigating and selection and how Nevada has defined its own case law so I have problems even overcoming that. We're not on the same equal footing when discussing what Nevada law means. So, I'll just submit it.

THE COURT: Is there anything else, any other record you want to make?

MR. ANTHONY: I don't think so, Your Honor.

Just one thing that I would mention that I think I neglected to mention just a moment ago is that the State's brief focuses a lot on the difference between the identity of the fact finder versus the standard of proof. And I just wanted to just make it clear that in *Hurst* itself and also in the *Apprendi* case which is the predecessor to *Hurst* they make it very clear that if you decide something is an element of the offense then it follows that the beyond a reasonable doubt standard of proof has to apply to that element. And so, I would disagree with at least what's being said over here that nobody has extended the sixth amendment jurisprudence to the beyond a reasonable doubt standard. I think that's clearly in *Hurst*. Its right at the tip of section 2 and it's also in *Apprendi* as well. So, that's the only thing that I think that I haven't covered that I wanted to at least talk about 'cause it was in their reply.

Thank you, Your Honor.

THE COURT: Okay, I am going to deny it. I do agree with the State's position. I am going to adopt the State's position. I do believe that the capital proceedings in this case are consistent with *Apprendi*, *Ring*, and *Hurst*. First of all, both the eligibility and suitability were decided by a jury, not by the judge. And likewise, the Court doesn't find anything in *Hurst* that mandates that the

second prong likewise be proven beyond -- or the -- aggravating, the mitigating weighing that be done beyond a reasonable doubt.

I am going to ask the State please prepare an order to be run by the special -- I'm sorry, the Federal Public Defenders Office for approval.

MR. OWENS: Okay. Could I get a transcript from today? Do you want me to submit an order?

THE COURT: Yes.

MR. OWENS: Okay; will do.

THE COURT: And also address the timing issue.

MR. OWENS: Yes, in line with you finding that it is -- or it's timely because the judgment was never final, but are you finding that it's successive and as an alternative basis there's no prejudice because *Hurst* doesn't mean these things?

THE COURT: Well, just basically finding that there's no prejudice. I mean --

MR. OWENS: No prejudice.

THE COURT: -- prejudice to the --

MR. OWENS: Okay.

THE COURT: -- State because basically the Court found that the capital scheme is not inconsistent with *Hurst*, and again, *Hurst* references *Ring* which they could have brought that relief several years prior but I just chose to go into the merits of the case because of --

MR. OWENS: Sure.

THE COURT: -- the time bars. But my suggestion would be to put the Court's findings on the timing issue to put it in the order. That way if you ever

want to bring it back up in front of the Nevada Supreme Court at least it's obviously there.

MR. OWENS: Oh, absolutely. They'll want that in there.

THE COURT: Because perhaps they're going to want --

MR. ANTHONY: We would definitely want to see that in there.

THE COURT: I mean it's kind of weird how it all played out and you know perhaps in some other cases the Supreme Court will issue a clarification on --

MR. OWENS: What I would like to do is along with these findings is submit an amended judgment. I guess it would be a second amended judgment but would differ from the last amended judgment in simply striking the language that says something to the effect of 'and an additional amount of restitution to be determined in the future.' If I --

THE COURT: That may be a suggestion if you want to ensure finality given the *Whitehead* and *Slaatte* cases.

MR. OWENS: You know, I don't agree with the Court that its necessary, but to avoid this issue in the future, and I'm all about doing what we can to avoid problems in the future, it won't help us with this case or this appeal going up, but for the next petition it might start the time bar. If the court later agrees with you that, yeah, the time for -- when your time bar never started then I'd like to get it started with an amended judgment so I'll submit that along with the findings.

THE COURT: It would be inappropriate for me to put my position there but I have a feeling the issue could be -- unless the Supreme Court issues some clarification it could be raised, because looking at old judgment of convictions it

seems to happen a lot where it's to be determined on certain things. So I guess there's always the potential for this issue to arise again so perhaps the Supreme Court should address it if they deem it appropriate.

MR. ANTHONY: And also, Your Honor, we would agree to the submission of an amended judgment consistent with what Mr. Owens is saying as well.

THE COURT: Yeah. Okay; thank you.

MR. OWENS: Okay. Thank you.

MR. ANTHONY: Thank you, Your Honor.

[Proceedings concluded at 11:12 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO:	94C117513
	DEPT NO:	XXIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 4/19/17
TIME OF HEARING: 11:00 AM

This Cause having come on for hearing before the Honorable STEFANY A. MILEY, District Judge, on the 19th day of April, 2017, the Petitioner not being present, represented by DAVID ANTHONY and TIFFANY L. NOCON, Assistant Federal Public Defenders, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 1995, William Witter was convicted of Murder With Deadly Weapon, Attempt Sexual Assault With Deadly Weapon, and Burglary for assaulting and attempting to rape Kathryn Cox, and then stabbing to death her husband, James Cox, when he tried to come to his wife's aid. Witter received the death penalty. His convictions and sentence were

affirmed on direct appeal. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur issued on December 23, 1996.

Witter filed a timely first post-conviction petition which was denied by the district court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 36927). Remittitur issued on September 14, 2001. After litigating a federal habeas petition for several years, Witter returned to state court by filing a second state habeas petition on February 14, 2007. That petition was also denied and again affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 50447). Witter also filed a third state habeas petition on April 28, 2008, which was also denied and affirmed on appeal (SC# 52964). Remittitur from this third habeas appeal issued on February 14, 2011. On January 11, 2017, Petition filed a fourth state habeas petition which raises a single issue based on Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). The State has filed a response and motion to dismiss the petition based on procedural default.

This Court finds that the instant petition, which is a fourth petition for a writ of habeas corpus by this Petitioner, is timely filed because the last Judgment of Conviction, although it does set a restitution amount, it also says an additional amount to be determined at a later date. Accordingly, it is not a final judgment and the time and procedural bars in NRS 34 never started to run. *See* Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012); Slaatte v. State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013) ("Because the judgment of conviction contemplates restitution in an uncertain amount, it is not final and therefore is not appealable"). Therefore, the petition is not procedurally barred.

Turning to the merits of the issue, this Court finds that the capital proceedings in this case are consistent with Apprendi, Ring, and Hurst. *See* Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). First of all, both the eligibility and suitability were decided by a jury, not by the judge. And likewise, the Court doesn't find anything in Hurst that mandates that the weighing of aggravating and mitigating circumstances be done beyond a reasonable doubt. Accordingly, neither appellate reweighing nor the weighing process implicate Hurst. Because Petitioner has not demonstrated prejudice the petition is denied.

ORDER

Based on the foregoing, the fourth petition is timely filed due to the lack of a final Judgment of Conviction, but Hurst is simply an application of Ring and nothing in Hurst requires the weighing process be subject to the beyond a reasonable doubt standard. The motion to dismiss the petition is granted and the petition is denied.

DATED this 23rd day of May, 2017.

STEFANY A. MILEY
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 10th day of May, 2017, by Electronic Filing to:

DAVID ANTHONY
Email: David_Anthony@fd.org

TIFFANY L. NOCON
Email: Tiffany_Nocon@fd.org

By: E Davis

Employee, District Attorney's Office

SSO//ed

Eileen Davis

From: Eileen Davis
Sent: Wednesday, May 10, 2017 10:24 AM
To: david_anthony@fd.org; tiffany_nocon@fd.org
Cc: Steven Owens; Eileen Davis
Subject: William Witter, 94C117513.
Attachments: Witter, William, 94C117513, FFCL&O..pdf

Findings of Fact, Conclusions of Law and Order.

The attached Findings will be submitted to the Judge on May 17, 2017.

Electronically Filed
6/5/2017 2:33 PM
Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM WITTER,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 94C117513

Dept No: XXIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on May 31, 2017, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 5, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 5 day of June 2017, I served a copy of this Notice of Entry on the following:

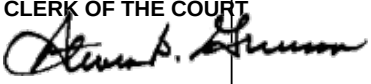
☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

William Witter # 47405
P.O. Box 1989
Ely, NV 89301

Rene L. Valladares, Federal Public Defender
411 E. Bonneville Ave., Ste 250
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk



NOASC
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(702) 388-5819 (Fax)

Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, v. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Nevada Attorney General, Respondents.	Case No. 94C117513 Dept. No. XXIII **NOTICE OF APPEAL** (Death Penalty Habeas Corpus Case)

NOTICE IS GIVEN that Petitioner William Witter appeals to the Nevada Supreme Court from the Findings of Fact, Conclusions of Law and Order entered on

/ / /

May 31, 2017 and mailed on June 5, 2017.

DATED this 10th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the July 10, 2017, a true and accurate copy of the foregoing NOTICE OF APPEAL was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Stephanie Young
An Employee of the
Federal Public Defender
District of Nevada