IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 73431

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court because it relates to a conviction for the death penalty. NRAP 17(a)(1).

STATEMENT OF THE ISSUE(S)

1. Whether the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), did not invalidate Nevada's capital sentencing scheme regarding this Court's practice of striking aggravating circumstance and reweighing the remaining sentencing evidence on appeal.

2. Whether the United States Supreme Court's decision in Hurst did not invalidate Nevada's capital sentencing scheme regarding the jury's outweighing procedure.

STATEMENT OF THE CASE

On January 21, 1994, William Lester Witter (hereinafter "Appellant") was charged by way of Information with: Count 1 – Murder With Use of a Deadly

Weapon (Felony – NRS 200.010, 200.030, 193.165); Count 2 – Attempt Murder With Use of a Deadly Weapon (Felony – NRS 193.330, 200.010, 200.030, 193.165); Count 3 – Attempt Sexual Assault With Use of a Deadly Weapon (Felony – NRS 193.330, 200.364, 200.366, 193.165); and Count 4 – Burglary (Felony – NRS 205.060). 1 RA 000001-05. On January 25, 1994, the State filed its Notice of Intent to Seek the Death Penalty. Id. at 000006-08.

Jury trial commenced on June 19, 1995. On June 28, 1995, the jury returned a verdict of guilty on all counts. AA 060-61. As to Count 1, the jury found Appellant guilty of First Degree Murder With Use of a Deadly Weapon. Id. On July 12, 1995, the State filed an Amended Notice of Intent to Seek the Death Penalty. On July 13, 1995, the jury returned a Special Verdict finding Appellant had committed First Degree Murder after previously having been convicted of a violent felony, while engaged in the commission of or an attempt to commit a Burglary and a Sexual Assault, and to avoid or prevent a lawful arrest or to effect an escape from custody. AA 019-20. The jury imposed a sentence of Death as to Count 1. Id. at 021.

Appellant was sentenced to the Nevada Department of Corrections on August 3, 1995, as follows: as to Count 1 – Death; as to Count 2 – twenty (20) years plus an equal and consecutive term of twenty (20) years for use of a deadly weapon; as to Count 3 – twenty (20) years plus an equal and consecutive twenty (20) years for use of a deadly weapon consecutive to Count 2; and as to Count 4 – ten (10) years

consecutive to Count 3. Id. at 065-66. The Judgment of Conviction was filed on August 4, 1995. Id. 060-62. An Amended Judgment of Conviction was filed on August 11, 1995. Id. at 064-67.

On August 31, 1995, Appellant filed a Notice of Appeal. 1 RA 000009-10. On July 22, 1996, this Court issued an Order affirming Appellant's conviction. Id. at 000011-37. However, this Court struck the finding that Appellant committed the crime to avoid or prevent a lawful arrest or to effect escape from custody. Id. at 000034-35. After reweighing the aggravating and mitigating circumstances, this Court upheld Appellant's sentence. Id. at 000036. Remittitur issued on January 8, 1997. Id. at 000037.

On October 27, 1997, Appellant filed a timely First Petition for Writ of Habeas Corpus. Id. at 000038-45. On August 11, 1998, Appellant filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus. Id. at 000070-108. The State filed its Opposition on September 22, 1998. Id. at 000109-41. The State filed a Supplemental Opposition to Appellant's Petition for Writ of Habeas Corpus on September 11, 2000. Id. at000149-63. Appellant filed a Supplemental Brief in Support of Petition for Writ of Habeas Corpus on September 12, 2000. Id. at 000164-88. On September 25, 2000, the district court entered its Findings of Fact, Conclusions of Law and Order denying Appellant's Petition. Id. at 000189-201.

On October 23, 2000, Appellant filed a Notice of Appeal. Id. at 202-03. On August 10, 2001, this Court issued an Order affirming the district court's decision and remittitur issued on September 14, 2001. Id. at 204-15.

On February 14, 2007, Appellant filed a Second Petition for Writ of Habeas Corpus. 2 RA 000216-450. On March 29, 2007, Appellant filed a Supplemental Claim to Petition for Writ of Habeas Corpus. 3 RA 000451-55. The State filed its Opposition and Motion to Dismiss on May 1, 2007. Id. at 000456-509. Appellant filed an Opposition to the State's Motion to Dismiss on June 28, 2007. Id. at 000520-54. The State filed its Reply on July 5, 2007. Id. at 000555-62. On August 28, 2007, Appellant filed a Supplemental Opposition to Motion to Dismiss. Id. at 000563-67. On September 26, 2007, the district court issued its Findings of Fact, Conclusions of Law and Order denying Appellant's Second Petition. Id. at 000585-90.

On October 29, 2007, Appellant filed a Notice of Appeal. Id. at 000593-94. On October 20, 2009, this Court issued an Order affirming the district court's decision and remittitur issued on January 20, 2010. Id. at 000595-614.

On April 28, 2008, Appellant filed a Third Petition for Writ of Habeas Corpus. Id. at 000615-25. The State filed its Response and Motion to Dismiss on July 15, 2008. Id. at 000666-70. Appellant filed his Reply and Opposition to the State's Motion to Dismiss on September 29, 2008. Id. at 000672-78. On November 24,

2008, the district court issued its Findings of Fact, Conclusions of Law and Order denying Appellant's Third Petition. Id. at 000679-83.

On December 19, 2008, Appellant filed a Notice of Appeal. Id. at 000686-87. On November 17, 2010, this Court issued an Order affirming the district court's decision and Remittitur issued on February 18, 2011. 4 RA 000688-98.

On January 11, 2017, Appellant filed a Fourth Petition for Writ of Habeas Corpus. AA 022-40. The State filed its Response and Motion to Dismiss on January 31, 2017. Id. at 041-58. On March 8, 2017, Appellant filed his Opposition to the State's Response and Motion to Dismiss. Id. at 068-113. On March 22, 2017, the State filed its Reply to Appellant's Opposition. Id. at 114-21. On May 31, 2017, the district court issued its Findings of Fact, Conclusions of Law and Order denying Appellant's Fourth Petition. Id. at 137-40.

On June 30, 2017, Appellant filed the instant Notice of Appeal. Id. at 143-45.

On July 10, 2017, Appellant filed a Notice of Appeal regarding the Third Amended Judgment of Conviction, which was filed July 12, 2017. 4 AA 000699-701, 000702-06. On November 14, 2019, this Court entered an order affirming the Third Amended Judgment of Conviction. Remittitur issued on December 18, 2019. Id. at 000708-20.

STATEMENT OF THE FACTS

This Court summarized the facts as follows:

On November 14, 1993, [K.C.] was working as a retail clerk for the Park Avenue Gift Shop located in the Luxor Hotel in Las Vegas, Nevada. James Cox (James), [K.C]'s husband, drove a taxicab in the Las Vegas area. At about 10:25 p.m., [K.C.] called James and informed him that she was having trouble with her car and needed assistance. James told her that he would be over to pick her up in about twenty-five to thirty minutes. [K.C.] returned to her car, got in, locked her door, and began to read a book.

About five to ten minutes later, the passenger side door opened, and [Appellant] got in the car. [Appellant] demanded that [K.C] drive him out of the lot. When [K.C.] informed him that she could not, [Appellant] stabbed her just above her left breast. [Appellant] pulled [K.C.] closer to him and told her that he was going to kill her. After stabbing [K.C.] several more times, [Appellant] became quiet, unzipped his pants and ordered [K.C.] to perform oral sex on him. [K.C.] attempted to comply with his demands, but because she had a punctured lung, she kept passing out. [Appellant] pulled [K.C.] into a sitting position and told her, "You're probably already dead." [K.C.] managed to open her door and attempted to run away, but was only able to get about ten or fifteen feet before [Appellant] caught her. [Appellant] forced [K.C.] back into the car and forced her to kiss him. He then used his knife to cut away [K.C.]'s pants and began to fondle her vaginal area with his finger.

[K.C.] observed her husband's cab pull up next to the driver's side of her car. [Appellant], not knowing that James was [K.C.]'s husband, held [K.C.] close and stated, "Don't say anything. I'm going to tell him that you're having a bad cocaine trip." James opened the driver's side door of [K.C.]'s car and told [Appellant] to get out. [Appellant] got out of the car, walked over to James, and stabbed him numerous times. James fell backwards and into [K.C.], who had gotten out of the car, knocking her to the ground. [K.C.] got up and ran for a bus stop. Once again, [Appellant] caught [K.C.] and carried her back to her car. After pulling the rest of [K.C.]'s clothes off,

> [Appellant] attempted to stuff James' body underneath James' cab. [K.C.] then heard hotel security approaching her vehicle.
>
> A security officer in charge of patrolling the Excalibur Hotel's employee parking lot approached [K.C.]'s car and confronted [Appellant]. After a short standoff, the security officer's backup arrived, and [Appellant] was subdued. Paramedics arrived a short time later, and [K.C.] was taken to the hospital where she eventually recovered from her injuries. James was already dead when the paramedics arrived.

Witter v. State, 112 Nev. 908, 913-14, 921 P.2d 886, 890-91 (1996).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion by denying Appellant's Fourth Petition because the Petition is procedurally barred. Appellant's Fourth Petition is time-barred. The doctrine of laches applies. Further, Appellant's claims are waived pursuant to NRS 34.810.

Appellant failed to demonstrate good cause to overcome the procedural bars. Reconsideration of Castillo v. State is not warranted. Hurst is Not Retroactive and Hurst is an application of Ring. Neither appellate reweighing nor the selection decision implicates Hurst. Appellate reweighing was appropriate. Finally, the reasonable doubt standard does not apply to weighing of aggravating and mitigating circumstances by a jury in imposing the Death Penalty and, thus, this Court did not violate Appellant's rights.

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ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S FOURTH PETITION BECAUSE THE PETITION IS PROCEDURALLY BARRED.

A. Appellant's Fourth Petition is Time-Barred.

Pursuant to NRS 34.726(1):

> 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 of the 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. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

This Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), this Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, this Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court 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. Additionally, this Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. This Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

Remittitur issued from Appellant's direct appeal on January 8, 1997. Therefore, Appellant had until January 8, 1998, to file a timely habeas petition. Appellant filed the Fourth Petition on January 11, 2017. AA 022-40. As such, the Fourth Petition is time barred and the district court did not abuse its discretion when it denied the Fourth Petition.

Even if the one-year rule did not begin to run until Appellant's new issue was available, the Fourth Petition is still time barred. Appellant'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. Appellant's Opening Brief ("AOB"), p. 7. Appellant also claims that appellate reweighing is unconstitutional. Id. Appellant premises these contentions upon Hurst v. Florida, 136 S. Ct. 616 (2016). Id. 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, 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 Appellant failed to raise it within one year of Ring's publication. Therefore, the district court correctly applied the one-year time bar in denying the Fourth Petition below.

B. The Doctrine of Laches Applies.

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 (5) years has passed since remittitur issued from Appellant's direct appeal on January 8, 1997. Indeed, over twenty (20) years have passed since Appellant's direct appeal was final. As such, the State pled statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) in its Response and Motion to Dismiss Appellant's Fourth Petition. AA 041-58. After such a passage of time, the State is prejudiced in its ability to answer the Fourth Petition and retry the penalty-phase. If Appellant'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. Therefore, the district court did not abuse its discretion when it denied Appellant's Fourth Petition for Writ of Habeas Corpus.

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C. Appellant's claims are waived pursuant to NRS 34.810.

Appellant's Fourth Petition was properly dismissed because Appellant's claims are waived and constitute 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). This 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. 95, 101, 368 P.3d 729, 733 (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.").

Appellant'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. Appellant's contention is that a new penalty hearing is required because of Hurst. AOB at 42. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 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. Appellant's failure to raise this complaint by June 24, 2003, amounts to a waiver. Appellant 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 at any point after June 24, 2002. Appellant's failure to do so renders his claim procedurally barred under NRS 34.810. Therefore, the district court did not

abuse its discretion when it denied Appellant's Fourth Petition for Writ of Habeas Corpus.

II. APPELLANT FAILED TO DEMONSTRATE GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS.

The district court did not abuse its discretion by refusing to disregard the procedural bars because Appellant 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. 192, 197, 275 P.3d 91, 94-95 (2012).

"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); 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 v. State, 118 Nev. 590, 595, 53 P.3d 901, 904 (2002) (*citing* Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

This 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 192, 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 petitioner raising good cause to

excuse procedural default rules must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077. See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Appellant's failure to pursue his Ring/Hurst complaint within one year of when it became available precludes a finding of good cause. Appellant's contention is that a new penalty hearing is required because of Hurst. AOB at 42. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring, 536 U.S. 584, 122 S. Ct. 2428. Hurst, 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, Appellant had until June 24, 2003, to bring this claim. Appellant has done nothing to address the more than fourteen (14) years that have passed between June 24, 2002, and the filing of the Fourth Petition on January 11, 2017. Ring was continuously available to Appellant during that nearly fifteen (15) year period. Appellant's silence is an

admission that he cannot demonstrate good cause. Polk v. State, 126 Nev. 180, 184-85, 233 P.3d 357, 360-61 (2010).

Appellant cannot demonstrate an impediment external to the defense since Ring has been readily available to him for approximately eighteen (18) years. Appellant 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, then, is when the legal basis arose for Appellant's newest claim. Hurst's publication date is irrelevant because Hurst is merely an application of Ring. Hurst, 577 U.S. at __, 136 S. Ct. at 621-22 ("[t]he analysis of 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. Appellant cannot use Hurst to bootstrap himself into a timely Ring complaint. See Crump v. State, 2016 WL 1204502 at *2 fn 5 ("Riley

would not provide good cause as it relies on Hern, which has been available for decades").[1]

Nor can Appellant fall back on allegations of ineffectiveness of prior post-conviction counsel for failing to raise a timely Ring challenge since the Federal Public Defender has represented Appellant since 2001. Further, the decision to litigate in federal court does not excuse Appellant's failure to comply with Nevada's procedural default rules. Colley, 105 Nev. at 236, 773 P.2d at 1230, abrogated on other grounds, Huebler, 128 Nev. at 197, fn 2, 275 P.3d at 95, fn 2.

Further, Appellant cannot establish "that errors in the proceedings underlying the judgment worked to [his] actual and substantial disadvantage." Huebler, 128 Nev. at 196-97, 275 P.3d at 94-95. Hurst does not apply retroactively to Appellant. Even if it did, Appellant received the process he was due under Ring. Therefore, Appellant failed to demonstrate good cause or prejudice to overcome the procedural bars and the district court did not abuse its discretion by denying Appellant's Fourth Petition for Writ of Habeas Corpus.

A. Reconsideration of Castillo v. State, 135 Nev. 126, 442 P.3d 558 (2019), is not warranted.

Appellant recognizes that his claims have been expressly rejected by this Court in Castillo v. State, 135 Nev. 126, 442 P.3d 558 (2019). AOB at 8. However,

[1] Citation to the unpublished opinion as persuasive authority is permissible. E.g., NRAP 36(c)(3); MB America Inc. v. Alaska Pacific Leasing Company, 123 Nev. Ad. Op. 8, 15, n.1 (Feb. 4, 2016).

Appellant requests this Court overrule its decision in Castillo. Id. at 8-12. This Court will not abandon precedent absent a compelling reason. City of Reno v. Howard, 130 Nev. 110, 114, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. 531, 534, 306 P.3d 395, 398 (2013)). As demonstrated above, Appellant has not offered a compelling reason and, thus, his request that this Court abandon precedent should be denied.

Moreover, Appellant's reliance on Andres v. United States, 333 U.S. 740 (1948), and Mullaney v. Wilbur, 421 U.S. 684 (1975), is misguided. In Andres, the defendant was challenging a statute which required that a jury, after finding the defendant guilty of first degree murder, must qualify that verdict as "without capital punishment," otherwise the death penalty would be mandatory. 333 U.S. at 746. This automatic imposition of the death penalty upon the finding of first degree murder was determined to be unconstitutional as the statute was vague and a reasonable juror could conclude that, unless the jurors were unanimously against death, the imposition of the death penalty must stand. Id. at 752. This "walking back" requirement, as Appellant refers to it, is absolutely nowhere to be found in Nevada's death penalty statute. See NRS 175.554. Further, in Mullaney, which does not apply to the death penalty whatsoever, the Supreme Court found that it was improper for the Maine homicide statutes to require that a defendant prove "heat of passion" by a preponderance of the evidence in order to reduce a murder to the lesser crime of

manslaughter. 421 U.S. at 703-04. Instead, the Supreme Court held that the State must prove the absence of heat of passion beyond a reasonable doubt. Id. This is absolutely inapplicable in the instant case because Appellant is not challenging Nevada's first degree murder statute and the jury does not begin with the presumption of death as Appellant mistakenly claims. Because Nevada's weighing procedures do not require that a jury qualify their verdict to decide against the death penalty and does not require that a defendant prove mitigating circumstances beyond a reasonable doubt, Appellant's reliance on these cases is misguided. Therefore, Appellant's request that this Court reconsider its decision in Castillo should be denied.

B. Appellate reweighing is not unconstitutional.

Appellant argues that Hurst held the weighing determination, like the finding of an aggravating circumstance, constitutes an "element" of the offense that must be proven by the State beyond a reasonable doubt. AOB at 12-13. This interpretation of Hurst is farfetched and disingenuous. 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 summarized its holding in Hurst in the first two paragraphs of the opinion thusly:

> A Florida jury convicted Timothy Lee Hurst of murdering his coworker, 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 its 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 process. Id.

In Appellant's case, a jury made all necessary findings for the death penalty, including that the aggravating factors outweigh the mitigating circumstances, in full compliance with Hurst, which is nothing more than an application of Ring. Accordingly, Hurst does not represent an intervening change in law sufficient to constitute good cause to overcome the procedural bars. Further, this Court has determined that the United States Supreme Court's decision in Hurst does not constitute good cause to overcome the procedural bars. See Castillo v. State, 135 Nev. 126, 442 P.3d 558 (2019); see also Howard v. State, 2019 WL 4619525 at *1 (Nev. Sept. 20, 2019); Byford v. State, 2019 WL 4447267 at *1 (Nev. Sept. 13, 2019); Powell v. State, 2019 WL 4447269 at *1 (Nev. Sept. 13, 2019); Doyle v. State, 2019 WL 4447298 at *1 (Nev. Sept. 13, 2019); Emil v. State, 2019 WL 4447340 at *1 (Nev. Sept. 13, 2019).[2]

Many other state courts have rejected an interpretation of Hurst that would extend the beyond-a-reasonable-doubt standard to the weighing determination:

> Importantly, the [Hurst] opinion did not hold that weighing must be done beyond a reasonable doubt. Indeed Hurst says nothing at all about whether the weighing of aggravating and mitigating circumstances must be determined beyond a reasonable doubt. And Leonard

[2] Citation to the unpublished opinion as persuasive authority is permissible. E.g., NRAP 36(c)(3); MB America Inc., 123 Nev. Ad. Op. at 15, n.1.

> points to no such discussion. Instead he parses the language of Hurst to infer the Court's meaning.

Leonard v. State, 73 N.E.3d 155, 169 (Ind. 2017). Evans v. State, No. 2013-DP-01877-SCT, 2017 Miss. LEXIS 249, at *78 (June 15, 2017) ("The Hurst decision did not rest upon or even address the beyond-a-reasonable-doubt standard"); 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 require . . . findings beyond a reasonable doubt . . . that the aggravating factors outweighed the mitigating factors. . . . . Nothing in Hurst . . . affects our conclusions in this regard."); People v. Jones, 3 Cal. 5th 583, 618-619, 220 Cal.Rptr.3d 618, 398 P.3d 529 (2017); Ex parte Bohannon, 222 So.3d 525, 532-533 (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 Ohio8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Appellant'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 Appellant's argument by the California and Alabama Supreme Courts to stand. Further, the United States Supreme Court denied certiorari for similar claims from Nevada cases. See Castillo, 135 Nev. 126, 442 P.3d 558,

cert. denied 2020 WL 1906635 at *1 (Apr. 20, 2020); see also Doyle, 2019 WL 4447298 at *1 (Nev. Sept. 13, 2019), cert. denied 2020 WL 1906635 at *1 (Apr. 20, 2020); Howard, 2019 WL 4619525 at *1 (Nev. Sept. 20, 2019), cert. denied 2020 WL 1906642 at *1 (April 20, 2020). If the Court intended the overbroad view of Hurst suggested by Appellant, certiorari would have been granted to give guidance to the lower courts.

Additionally, several federal district courts in Nevada have examined the issue in at least 6 capital cases so far and consistently held that Hurst cannot be "stretched" so far as to conclude that the reasonable doubt standard applies to the weighing process:

> Leonard's claim extends the holding in Hurst well beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing aggravating and mitigating circumstances is an "element" that must be submitted the jury.

Leonard v. Filson, D.Nev. No. 2:99-cv-0360-MMD-CWH, 2017 U.S. Dist. LEXIS 132801, at *6 (Aug. 18, 2017); see also Emil v. Filson, D.Nev. No. 3:00-cv-00654-KJD-VPC, 2017 U.S. Dist. LEXIS 175609, at *3-5 (Oct. 22, 2017) ("Emil's claim extends the holding in Hurst well beyond its cognizable bounds. Hurst does not hold, as Appellant claims, that the weighing aggravating and mitigating circumstances is an 'element' that must be submitted to the jury"; Hernandez v. Filson, D.Nev. No. 3:09-cv-00545-LRH-WGC, 2017 U.S. Dist. LEXIS 147103, at *3-6 (Sep. 11, 2017)

("Hernandez's claims extend the holding in Hurst beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing of aggravating and mitigating circumstances is an 'element' that must be submitted to the jury, or to which the reasonable doubt standard must apply").

Well before Hurst, every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating and mitigating circumstances 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 Appellant's interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published almost four years 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 Appellant'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); see also United States v. Sampson, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that Kansas v. Carr undermines the claim that Hurst requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard).

Clearly, Appellant's interpretation of Hurst is against the great weight of authority. Another strong reason to reject Appellant's dubious construction of Hurst is how the United States Supreme Court dealt with its own precedent in Hurst. Hurst cited Walton without overruling it. Hurst, 136 S. Ct. at 622. This is telling because Appellant'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 v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047, 3055 (1990) [emphasis added]. If this Court intended the holding Appellant attributes to Hurst, it would have addressed this direct conflict. Indeed, where Walton conflicted with Ring, this 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.").

In the Rauf opinion cited by Appellant, the Delaware death penalty scheme was held unconstitutional because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity. Rauf v. State, 145 A.3d 430 (Del. 2016). While these decisions were "prompted" in part by the Hurst decision, the analysis actually required the court "to interpret not simply the Sixth Amendment itself, but the complex body of case law interpreting it," leading to "a diversity of views on exactly why the answers to the questions are what we have found them to be." Id. Specifically, regarding the application of the reasonable doubt burden of proof to the weighing process, there is nothing in the Rauf opinion which cites to the Hurst case as the basis or reason for that particular decision. Id. In fact, the concurrences suggest that the beyond-a-reasonable-doubt standard applies to weighing because of historical analysis and the Delaware Constitution rather than as a direct requirement of Hurst. Id. at 481-2 (Strine, concur), 484-5 (Holland, concur).

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. 356, 365-66, 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 this Court has referred to as the "selection" phase of the capital sentencing process. Id. Appellant ignores that Nevada's use of the term, "eligibility," unlike the federal courts, has historically referred to both narrowing and individualized selection. Id. Appellant is not at liberty to re-interpret Nevada statutes in a manner inconsistent with this 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.

a. Hurst is Not Retroactive and 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, 136 S. Ct. at 621-22. The entirety of the Court's discussion in Hurst focused on applying Ring to the case before it. Id. 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, the Court 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.

Accordingly, several other courts have concluded that Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017); Lambrix v. Secretary, 872 F.3d 1170, 1182-1183 (11th Cir.2017); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017); In re Coley, 871 F.3d 455 (6th Cir. 2017). Given the conclusion that Hurst is nothing more than an

application of Ring, it necessarily follows that Hurst is not retroactive the same as Ring.

Further, the Ninth Circuit addressed the issue of whether Hurst is retroactive in Ybarra v. Filson, 869 F.3d 1016 (9th Cir. 2017). In Ybarra, the defendant was found guilty of first degree murder and the jury imposed the death penalty in 1981. 869 F.3d at 1019. After the Supreme Court issued its decision in Hurst, defendant filed an additional petition for writ of habeas corpus and argued that he was entitled to relief based on that decision. Id. at 1030. The Ninth Circuit found that Nevada's death penalty statute did not "run afoul" of Hurst and that it was unclear whether Hurst created a new constitutional rule because it may merely apply the finding in Ring. Id. at 1031. However, for the sake of argument, the Ninth Circuit assumed defendant's arguments were correct and still concluded that his claims lacked merit. Id. The Ninth Circuit further found that Hurst does not apply retroactively. Id. at 1031-32. The Ninth Circuit made this determination because Hurst is merely an application of Apprendi and Ring. Id. at 1032-33. These cases had already been determined to not apply retroactively and, because Hurst merely applied the same principles, the Ninth Circuit failed to see why Hurst would apply retroactively. Id. at 1033. Although the Court did acknowledge that the case could have been decided on more narrow grounds, its ruling that Hurst was not retroactive was appropriate based on precedent from the Ninth Circuit as well as the United States Supreme

Court. Id. Therefore, Appellant's claim that the decision in Ybarra does not affect Appellant's case is incorrect and Appellant's claim fails.

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 Appellant's argument. This conclusion, by the only state court offering any support to Appellant's position, that his argument is fundamentally distinguishable from Hurst, should be fatal to his claim. 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). Appellant's convictions were final with the remittitur issued in 1997 from his direct appeal. As such, neither Ring nor Hurst apply to this matter.

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b. Neither appellate reweighing nor the selection decision implicates Hurst.

Either Appellant 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 this Court's reweighing analysis on appeal of the denial of his second habeas petition violated Hurst. Both of these complaints are equally unpersuasive because this 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.

i. 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 the

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 Court further explained that a Clemons reweighing is not a resentencing but instead is "akin to harmless-error review." See McKinney v. Arizona, 140 S. Ct. 702, 706 (2020).

This 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).

Appellant'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 Appellant's contention. Ring itself specifically noted that it "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, 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 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.

This 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).

Appellate reweighing or harmless error review after invalidation of an aggravating circumstance does not implicate factual findings. In Clemons, the Supreme 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 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.

Most importantly, the United States Supreme Court has recently upheld its decision in Clemons. McKinney, 140 S. Ct. 702. Appellant attempts to argue that McKinney concluded that Clemons only remained good law in Arizona for a

petitioner whose conviction was final before Ring. AOB at 19. However, McKinney clearly applies to Appellant's claim. In McKinney, the Ninth Circuit ruled that the Arizona Supreme Court had failed to properly consider mitigating evidence and remanded the case back to the Arizona Supreme Court. McKinney, 140 S. Ct. at 706. On remand, the Arizona Supreme Court reweighed the aggravating and mitigating circumstances and upheld both McKinney's death sentences. Id. The United States Supreme Court held that such reweighing was permitted under Clemons. Id. at 707. The Court noted that Clemons hinged on its assessment of appellate court's ability to weigh aggravating and mitigating evidence. Id. The Court also held that Clemons is unaffected by the decisions in Hurst and Ring. Id. at 708 ("In short, Ring and Hurst did not require jury weighing of aggravating and mitigating circumstances, and Ring and Hurst did not overrule Clemons so as to prohibit appellate reweighing of aggravating and mitigating circumstances."). Additionally, the United States Supreme Court ruled that Ring and Hurst do not apply retroactively on collateral review. Id.

Appellant further argues that appellate reweighing is "substantially different" from a harmless error analysis. AOB at 21-29. However, Clemons directly states that an appellate reweighing is not a sentencing proceeding that must be conducted by a jury. Clemons, 494 U.S. at 741, 744-45, 110 S. Ct. 1441. Further, the United States Supreme Court has noted that appellate reweighing is akin to harmless-error review

and that courts routinely conduct such review. McKinney, 140 S. Ct. at 708-09. Therefore, Appellant's contention that appellate reweighing is "substantially different" is directly contradicted by United State Supreme Court precedent. Here, this Court reviewed Appellant's case on direct appeal and concluded that, while one of the aggravating circumstances considered should have been stricken, after a reweighing analysis was conducted, Appellant's sentence should be upheld. 1 RA 000034-36. This Court correctly followed the procedure allowed under Clemons. Further, this procedure was not affected by the United States Supreme Court's decisions in Ring and Hurst. McKinney, 140 S. Ct. at 708. Therefore, Appellant's claim fails.

c. The reasonable doubt standard does not apply to weighing of aggravating and mitigating circumstances by a jury in imposing the Death Penalty and, thus, the district court did not violate Appellant's rights.

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, 131 Nev. at 365-66, 351 P.3d at 732. This weighing is not a factual determination and is not subject to the beyond-a-reasonable-doubt standard. Nunnery, 127 Nev. at 772-76, 263 P.3d at 251-53. The Court reached this conclusion in the context of a Ring and Apprendi 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. 243, 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.

Because Clemons reweighing comports with the requirements of Ring and because Appellant received all the protections required by Ring, the district court did not err in denying Appellant's Fourth Petition for Writ of Habeas Corpus.

CONCLUSION

The district court did not abuse its discretion by denying Appellant's Fourth Petition because the Petition is procedurally barred. Appellant's Fourth Petition is time-barred. The doctrine of laches applies. Further, Appellant's claims are waived pursuant to NRS 34.810.

Further, Appellant failed to demonstrate good cause to overcome the procedural bars. Reconsideration of Castillo v. State is not warranted. Hurst is not retroactive and Hurst is an application of Ring. Neither appellate reweighing nor the selection decision implicates Hurst. Appellate reweighing was appropriate. Finally,

the reasonable doubt standard does not apply to weighing of aggravating and mitigating circumstances by a jury in imposing the Death Penalty and, thus, this Court did not violate Appellant's rights.

Based on the foregoing, the State respectfully requests that this Court affirm the district court's denial of Appellant's Fourth Petition for Writ of Habeas Corpus.

Dated this 30th day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page and type-volume limitations of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 10,123 words and does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of June, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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