IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73431

WILLIAM WITTER

Appellant,

v.

STATE OF NEVADA,

Respondent.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

State Statutes

I. INTRODUCTION

For a defendant to be death eligible, Nevada law requires the jury to find that at least one aggravating factor exists and that mitigating evidence does not outweigh statutory aggravating factors. NRS 175.554(2)(a)(b), 200.030(4)(a). The jury is not permitted even to consider a death sentence until it makes both of these preliminary findings. *See* NRS 175.554(2)(c).

This makes Nevada "relatively unique," as put by this Court in *Lisle v. State*, 131 Nev. __, 351 P.3d 725, 732 (2015). Although many jurisdictions require only one finding for death-eligibility—the existence of at least one aggravating factor—Nevada's requires two determinations for death eligibility. NRS 175.554(2)(a)(b), 200.030(4)(a). But the trial court instructed Witter's jury it needed to make only the first determination—that an aggravating factor existed—beyond a reasonable doubt. *See* 1AA008.

Relying on *Hurst v. Florida*, 136 S. Ct. 616 (2016), Witter has challenged the constitutionality of the standard of proof used for the

second eligibility finding and this Court's reweighing of the aggravating factors and mitigating evidence on appeal.

In response, the State argues this Court should affirm the district court's denial of Witter's petition for several reasons: Witter cannot overcome various procedural bars; *Hurst* merely extended *Ring v. Arizona*, 536 U.S. 584 (2002) and did not create a new rule; *Hurst* does not implicate the burden of proof; the outweighing determination is not subject to a reasonable doubt standard in Nevada because is it not a factual determination; *Hurst* does not implicate appellate reweighing; *Hurst* does not apply retroactively; and this Court's decision in *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), *cert. denied sub nom. Castillo v. Nevada*, 137 S. Ct. 831 (2017), was rightly decided. None of these arguments prevail.

II. ARGUMENT

The State's arguments fail because *Hurst* created a new rule that broke ground not addressed by *Ring* and implicates Nevada's unique death-sentencing structure. Given *Hurst's* holding, the outweighing decision must be undertaken by a jury using the beyond a reasonable doubt standard and cannot be undertaken by an appellate court.

Moreover, *Hurst* is retroactive under Nevada law's broader standards of retroactivity. To the extent this Court held otherwise in *Castillo*, it was wrongly decided and Witter is entitled to relief.

A. The State mistakenly suggests that Witter's petition was dismissed based on procedural bars.

In his Opening Brief, Witter explained that his petition was rejected in the district court on the merits of his *Hurst* claim, not based on applying procedural bars. Op. Br. at 8; 1AA138 ("the petition is not procedurally barred.").

On appeal, however, the State argues "[t]he 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" and that Witter cannot overcome NRS 34.726(1), NRS 34.800(1)(b)(2), and NRS 34.810(3). Ans. Br. at 14. *See also* Ans. Br. at 12 ("Appellant's Fourth Petition was properly dismissed . . . .").

Witter takes this opportunity to reiterate that the district court did not dismiss Witter's petition, and instead ruled on the merits of his *Hurst* claim. *See* 1AA138 ("Turning to the merits of this issue, . . . neither appellate reweighing nor the weighing process implicate

Hurst."). Moreover, the proper standard of review is not for an abuse of discretion like the State suggests, Ans. Br. at 7, but de novo. *See* Op. Br. at 7; *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008).

B. *Hurst* established a new rule, which applies to Nevada's "relatively unique" death-sentencing framework.

On appeal the State argues that Witter cannot use *Hurst* to overcome various procedural bars because *Hurst* was merely an application of *Ring* and Witter did not file his petition within a year of *Ring*. Ans. Br. at 14–16. Setting aside that the district court did not find the petition procedurally defaulted,[1] the State is incorrect because *Hurst* broke new ground not addressed by *Ring*.

The claim in *Ring* was "tightly delineated," 536 U.S. at 597 n.4, leaving open several issues, including whether the Sixth Amendment and Due Process Clause apply to the outweighing determination, *see id.* The United States Supreme Court in *Hurst* answered that question: a jury must find beyond a reasonable doubt *all* conditions precedent to imposing a death sentence, not just the presence of an aggravating circumstance. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment

[1] *See* 1AA138.

requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"). As a result, in relatively unique states, like Nevada—which require the outweighing determination to be resolved in the state's favor as a condition of death eligibility, *see Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000)—the outweighing determination, along with any other death-eligibility findings, must be made by the jury beyond a reasonable doubt. Thus, even if Witter's petition was dismissed due to procedural default bars, that would have been error because Witter filed his meritorious *Hurst* claims within one year of *Hurst*. *See Clem v. State*, 119 Nev. 615, 620–21, 81 P.3d 521, 525 (2003).

C. *Hurst* applies to the standard of proof, not just the identity of the fact-finder.

To support its argument that *Hurst* did not create new law, the State argues that because *Hurst* does not cite to *In re Winship*, 397 U.S. 358 (1970), or the reasonable-doubt standard, *Hurst* does not concern the standard of proof. *See* Ans. Br. at 21.

Although the Court in *Hurst* faced the question of whether a jury, as opposed to a judge, must make the outweighing finding, the Court nonetheless began its substantive discussion by recognizing that the Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Id.* at 621.

More important, a long line of cases, including the entire line of cases *Hurst* relies on, clarify that the Sixth Amendment right to a jury trial is so intertwined with the due process right to findings beyond a reasonable doubt that the two cannot be separated. *See Alleyne v. United States*, 570 U.S. 99, 104 (2013) ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt."); *Ring*, 536 U.S. at 600 (alteration in original) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to

a jury, and proven beyond a reasonable doubt." (citation and internal quotation marks omitted)); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. *It is equally clear that such facts must be established by proof beyond a reasonable doubt.*'" (alteration in original) (emphasis added) (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1993) (Stevens, J., concurring); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated."); *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens").

The Delaware Supreme Court correctly recognized the intertwined nature of the two rights. *See Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (concluding that *Hurst* requires the outweighing determination to be made beyond a reasonable doubt and that the absence of such a standard in Delaware's death-penalty statute is unconstitutional); *Rauf*, 145 A.3d at 481–82 (majority concurring opinion of Strine, C.J.) ("If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed.").

But most of the cases the State relies on for its arguments that *Hurst* does not apply to the burden of proof do not address or even attempt to distinguish this precedent. *See* Ans. Br. at 22–23. This may be because in several cases, questions about the standard of proof were irrelevant: because the weighing determination in those jurisdictions does *not* increase the maximum sentence—in

contrast to Nevada's scheme—it is not subject to either the Sixth Amendment jury right or the due process right to findings beyond a reasonable doubt. *See Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) ("[B]ecause in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment."), *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831 (2017); *People v. Jones*, 398 P.3d 529, 553 (Cal. 2017) (explaining that defendant was death eligible after jury found him guilty of murders and found one special circumstance); *State v. Mason*, 111 N.E.3d 432, (Ct. Ap. Ohio 2016) ("The trial court in this case ignored the most important feature that renders Ohio's death-penalty statute constitutional under the Sixth Amendment through *Apprendi*, *Ring*, and *Hurst*—that the jury, not the judge, determines beyond a reasonable doubt the existence of an aggravating circumstance—the feature that subjects a defendant to the possibility of death as a sentence.").

Thus, due to the intertwined nature of these rights, *Hurst* implicates both the identity of the fact finder and the standard of proof required by the Sixth Amendment and Due Process clause.

D. Because the outweighing determination is a prerequisite for death-eligibility, *Hurst* mandates it be determined beyond a reasonable doubt.

Witter argued that because the outweighing determination is a prerequisite for death eligibility in Nevada, it must be determined by a jury beyond a reasonable doubt. Op. Br. at 13–17. In response, the State argues that the outweighing step is not subject to the reasonable doubt standard because it is a "moral judgment" as opposed to a factual determination, and because it is part of the "sentence selection process" and not eligibility. Ans. Br. at 25, 28–29, 38–40.

The State's argument is unpersuasive because it ignores that, for the Sixth Amendment, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

Nevada law provides a clear answer: "[T]wo things are necessary before a defendant is *eligible* for death: the jury must find unanimously

and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating." *Hollaway*, 116 Nev. at 745, 6 P.3d at 996 (emphasis added); *see Lisle*, 351 P.3d at 732 (describing "relatively 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"); *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*." (emphasis added)); *Bennett*, 111 Nev. at 1110, 901 P.2d at 683 ("[T]he death penalty is only a sentencing *option* if, after balancing and evaluating the aggravating and mitigating circumstances, the former are found to outweigh the latter."); *Ybarra v. State*, 100 Nev. 167, 176, 679 P.2d 797, 802 (1984) (explaining that "death penalty may be imposed" only if "the mitigating factors outweigh the aggravating factors"); NRS 175.554(3) ("The jury may impose a sentence of death only if it finds at least one aggravating

circumstance and *further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." (emphasis added)); NRS 200.030(4)(a) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

Thus, according to the plain language of the statutes and decades of case law from this Court, both eligibility findings—the finding of aggravators and the outweighing determination—"expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," and are "elements" of the sentence subject to the protections of the Sixth Amendment and Due Process Clause. *Apprendi*, 530 U.S. at 490, 494; *see Hurst*, 136 S. Ct. at 619, 621.[2]

Even if the outweighing determination must be labeled as "factual," it could be labeled as such because it is a determination based on a limited set of facts. *See Hollaway*, 116 Nev. at 746, 6 P.3d at 997

[2] As explained in the Opening Brief, Witter recognizes this Court has held otherwise in *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019) but urges this Court to reconsider that decision for the reasons explained in the Opening Brief and below. *See* Op. Br. at 8–12.

("'Other matter' evidence is *not* admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances.") (emphasis in original); *Middleton*, 114 Nev. at 1117 & n.9, 968 P.2d at 315 & n.9 (explaining that other-matter evidence may not "be used to determine death eligibility itself"); *Gallego v. State*, 101 Nev. 782, 791, 711 P.2d 856, 863 (1985) ("If the death penalty option survives the balance of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to the sentence." (citing NRS 175.552)).[3]

That the jury may have to engage in some subjectivity in determining the outweighing step does not place it beyond the reach of the reasonable doubt standard. Jurors are often asked to make such decisions beyond a reasonable doubt. For example, in *United States v.*

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[3] In contrast, it is the third and final step in Nevada, not the penultimate outweighing step, that more closely matches what federal courts have classified as a "moral" determination. During that step, juries in Nevada consider all of the evidence, along with abstract concepts like "mercy," *see, e.g.*, *Hollaway*, 116 Nev. at 746–47, 6 P.3d at 996–97; *Evans v. State*, 112 Nev. 1172, 1204, 926 P.2d 265, 285–86 (1996), to reach a determination whether the death sentence should be imposed.

Gaudin, the United States Supreme Court rejected the government's argument that a judge could find an element of a crime—materiality—because it involved a mixed question of law and fact. 515 U.S. 506, 511–15 (1995) (explaining that inquiries involving "delicate assessments of the inferences a reasonable decisionmaker would draw from a given set of facts and the significance of those inferences to him is peculiarly one for the trier of fact" (citation and internal quotation marks, ellipses, and brackets omitted); *see Neder v. United States*, 527 U.S. 1, 8, 25 (1999). And several common statutory aggravators also involve subjective concepts: whether a homicide was committed "in an especially heinous, cruel, or deprived manner," Ariz. Rev. Stat. § 13-751(F)(6); whether a "defendant exhibited utter disregard for human life," Idaho Code Ann. § 19-2515(9)(f); and whether "[t]he offense was outrageously or wantonly vile, horrible, or inhuman," S.D. Codified Laws § 23A-27A-1(6). In noncapital schemes, too, legislatures and courts routinely require findings from juries about, for example: a defendant's "departure from fundamental honesty, moral uprightness, or fair play and candid business dealings," *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997) (emphasis omitted) (quoting jury instructions); a

work's "literary, artistic, political, or scientific value," *Hamling v. United States*, 418 U.S. 87, 102 (1973); and whether a course of action involved a "gross deviation from the standard of care," Model Penal Code § 2.02(2)(d).

Last, the State's equivocation between "eligibility" and "selection" must fail—regardless of any label given to the outweighing determination, under Nevada law it is a prerequisite for death eligibility. The State says as much. *See* Ans. Br. at 27 ("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."). Thus, because it is necessary to make the outweighing determination to render a defendant death-eligible, that determination must be submitted to a jury and subject to the beyond a reasonable doubt standard. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

E. *Hurst* implicates appellate reweighing and demonstrates the practice is unconstitutional.

Witter argued that *Hurst* made clear that appellate reweighing was no longer constitutionally tolerable, and he provided examples of the issues with appellate reweighing in his proceedings. *See* Op. Br. at 17–29.

In response, the State argues appellate reweighing is generally permissible because it is "akin to harmless-error review," but does not specifically address the review this Court conducted in Witter's case. *See* Ans. Br. at 29–38 (quoting *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020)). The State does not address the blended review used in this Court's appellate reweighing. *See* Op. Br. at 22–26. Nor this Court's critical—but mistaken—belief as to the number of remaining aggravators. *See id.* at 26–27. Nor the difference in mitigating evidence this Court considered in one review to the next. *See id.* at 27–29.

But, as explained in the Opening Brief, there are crucial differences between harmless-error review and appellate reweighing. *See* Op. Br. at 21–22. And in Witter's proceedings, this Court engaged in appellate reweighing—not a pure harmless-error review, which

would have required the State to meet the standard in *Chapman v. California*, 386 U.S. 18, 22–24 (1967). *See id.* Because the underpinnings of *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990) that tolerated appellate reweighing in a scheme like Nevada's have been eviscerated by *Hurst*, appellate reweighing is no longer constitutionally tolerable.

The State argues that *McKinney* forecloses Witter's argument that appellate reweighing is unconstitutional. Ans. Br. at 36–37. But, as set forth in the Opening Brief, there are crucial differences between Nevada's relatively unique three-step system and *McKinney's* "narrow" holding with respect to Arizona's scheme. *See* Op. Br. at 19–20; 140 S. Ct. at 706. *McKinney* held that *Ring* and *Hurst* do not affect who may undertake a weighing decision after a defendant has been found by a jury to be death eligible—but in Nevada, the outweighing decision is a prerequisite to death eligibility. *Compare McKinney*, 140 S. Ct. at 707 ("a jury must find the aggravating circumstance that makes the defendant death eligible. But . . . a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the

relevant sentencing range."), *with Lisle*, 351 P.3d at 732 (describing "relatively 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"); Ans. Br. at 27 ("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."). Because a defendant cannot be eligible for death in Nevada without an outweighing determination, it is a determination that must be left to a jury to determine beyond a reasonable doubt. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). This crucial difference is what sets apart Arizona's capital sentencing scheme from Nevada's and renders this aspect of *McKinney* inapplicable to Witter.

Because appellate reweighing is no longer tolerable in Nevada under *Hurst*, this Court's appellate reweighing usurped the province of the jury and violated both the Sixth Amendment and Due Process Clause.

F. *Hurst* applies retroactively.

Witter argues that *Hurst* applies retroactively to his case. *See* Op. Br. at 32–42. The State disagrees, arguing in several places that *Hurst* is not retroactive under federal standards. *See* Ans. Br. at 18, 29–31, 37. However, the State only discusses federal retroactivity authority and fails to address Witter's arguments regarding Nevada's standard for retroactivity. *Id.*

As explained in Witter's Opening Brief, the standard in Nevada is more relaxed and "more liberally defines the two exceptions to the usual rule of nonretroactivity." *Clem v. State*, 119 Nev. 615, 628, 81 P.3d 521, 530 (2003); *see Colwell v. State*, 118 Nev. 807, 818–19, 59 P.3d 463, 471 (2002). The cases cited by the State are irrelevant; all rely on the stricter federal standard. *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020); *Schriro v. Summerlin*, 542 U.S. 348, 351–58 (2004); *Lambrix v. Sec'y, Florida Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 217 (2017); *Lambrix v. Sec'y, Florida Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017); *In re Jones*, 847 F.3d 1293, 1294–95 (10th Cir. 2017); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017).

Using the correct standard, the new rule announced in *Hurst* applies retroactively both as a procedural and as a substantive rule. *See* Op. Br. at 32–42; *see also Powell v. Delaware*, 153 A.3d 69, 74 (Del. 2016) ("The burden of proof is one of those rules that has both procedural and substantive ramifications.").[4]

G. This Court should overrule *Castillo* and reverse the district court's erroneous decision.

In his Opening Brief, Witter explained how *Castillo* should be overturned because that decision represented a sharp divergence in precedent and Nevada's statutory framework, and effectively created a "walk-back" mechanism of death eligibility in violation of Supreme Court precedent in *Andres v. United States*, 333 U.S. 740 (1948) *and Mullaney v. Wilbur*, 421 U.S. 684 (1975).

As to the first argument, the State responds this Court should not abandon precedent absent a compelling reason. *See* Ans. Br. at 18–19. But that is precisely why this Court should overturn *Castillo*, which

[4] To the extent this Court's decision in *Castillo* held otherwise, 135 Nev. at 129, 442 P.3d at 560 ("*Hurst* broke no new ground in this area"), Witter urges this Court to revisit that decision. *See* Op. Br. at 8–12 and below.

itself represented an upheaval of approximately thirty years of established precedent without a compelling reason. *See* Op. Br. at 9–10.

As to the second argument, the State points out "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." Ans. Br. at 19. That is precisely the problem: this Court's decision in *Castillo* added a mechanism not contemplated by Nevada's death penalty statutes. By holding that a defendant could be death eligible at the first step (the finding of aggravating circumstances), but then be walked back to non-death eligibility at the second step (the outweighing decision) under an uncertain burden of proof, this Court contemplated a system beyond that enumerated in Nevada statutes and in violation of the principles in *Andres* and *Mullaney*.

Last, the State argues that had *Castillo* or its predecessors been wrongly decided, the United States Supreme Court would have granted certiorari to "give guidance to the lower courts." *See* Ans. Br. at 24. But, as put by the High Court, "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been

told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

For the reasons above and as stated in the Opening Brief, *Castillo* was wrongly decided. This Court should correct the sharp divergence from its precedents and grant Witter relief.

III. CONCLUSION

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

DATED this 28th day of September, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 4,181 words: or

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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.

Respectfully submitted,

/s/ *Stacy Newman*
STACY NEWMAN
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 28, 2020. Electronic Service of the foregoing **APPELLANT'S REPLY BRIEF** shall be made in accordance with the Master Service List as follows:

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