IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J. HORWITZ, and DEBORAH A. CZUBA,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT of the STATE of NEVADA, IN AND FOR the COUNTY of CLARK; and THE HONORABLE MICHAEL P. VILLANI,

Respondents,

and

TIMOTHY FILSON, Warden, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and THE STATE OF NEVADA,

Real Parties in Interest.

Supreme Court Case No.

Underlying Case: Clark County Dist. Ct. No. 81C053867

APPELLANT'S APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

VOLUME 2 OF 3

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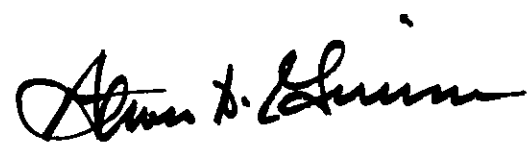

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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 81C053867 DEPT NO: XVII

REPLY TO OPPOSITION TO MOTION TO STRIKE AMENDED FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: March 17, 2017
TIME OF HEARING: 9:30 a.m.

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits this Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Court summarized the facts of this case in the Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth demand for habeas relief:

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.
>
> Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.
>
> Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.
>
> Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.
>
> Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.
>
> Dr. Monahan was a dentist with a practice located on Desert Inn Road

within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred

on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed

an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[1]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[2] Howard also stated he was on veteran's disability in New York.[3] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

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[1] This evidence was admitted to show identity and motive for the Monahan murder.

[2] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[3] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 12-19 (footnotes in original)).

STATEMENT OF THE CASE

This Court also set forth the vast majority of the procedural history of this case in the 2010 Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth habeas petition:

> On May 20, 1981 defendant Samuel Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
>
> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
>
> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
>
> Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.
>
> Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.
>
> A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.
>
> At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.
>
> On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a

continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felongy - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion

to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those

records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[5]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[6]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could

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[4]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[5] Collier was decided two years after Howard's trial.

[6] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to

challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and

second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[7]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 1-12 (footnotes in original)).

This Court denied Petitioner's fourth habeas petition. (Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 26-33). Petitioner challenged this Court's decision before the Nevada Supreme Court. (Notice of Appeal, filed on December 21, 2010). Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, __ Nev. __, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at __, 291 P.3d at 139. A cover sheet indicated that the motion was

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[7] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

[8] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010._____.

sealed but the FPD failed to file a separate motion to seal the pleading. Id. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at __, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014. The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 2908 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 5, 2016). Respondent filed an opposition and motion to dismiss on November 2, 2016. (Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction) (Opposition and Motion to Dismiss), filed November 2, 2016).

On December 1, 2016, Petitioner filed an amended fifth state habeas petition. (Amended Petition for Writ of Habeas Corpus (Post-Conviction) (Amended Fifth Petition), filed December 1, 2016). The State moved to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). (Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction), filed December 12, 2016). Petitioner opposed this request. (Opposition to Motion to Strike, filed February 3, 2017).

ARGUMENT

Petitioner fails to explain his intentional decision to wait until just before the one-year time bar of NRS 34.726(1) kicked in before filing his Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), complaint. This failure is fatal and requires that his fugitive pleading be struck from the record.

As a preliminary matter, Petitioner complains that Respondent does not engage "with the substantial constitutional challenges that Mr. Howard has raised[.]" (Opposition to Motion to Strike, p. 3). Petitioner's concern is premature, Respondent is not permitted to address the merits of the Hurst claim until directed to do so by this Court. See, NRS 34.745(1)(a); NRS 34.750(3). Regardless, the State cannot answer this claim until this Court adjudicates the Motion to Strike.

As to the merits of the Motion to Strike, Petitioner discounts NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006), in favor of Rule 15 of the Nevada Rules of Civil Procedure (NRCP). (Opposition to Motion to Strike, p. 9). Despite Petitioner's contention that NRCP 15 "has seemingly never been cited by the Nevada Supreme Court in a post-conviction case[,]" the Court has declined to apply NRAP 15 to prost-conviction proceedings. State v. Powell, 122 Nev. 751, 755-59, 138 P.3d 453, 456-58 (2006). Indeed, the Nevada Supreme Court has concluded that the Nevada Rules of Civil Procedure are generally inapplicable in habeas proceedings. McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1990).

Petitioner is also incorrect when he complains that leave of court and a showing of good cause are not mandatory prerequisites to the filing of a supplemental pleading. (Opposition to Motion to Strike, p. 3-4). Petitioner's attempt to limit Barnhart to new claims raised at an evidentiary hearing is unpersuasive. NRS 34.750(5)'s requirement that a habeas court grant leave to file a supplemental pleading demonstrates that this Court performs a gatekeeping function. That this involves determining whether a petitioner is intentionally delaying a proceeding through piecemeal litigation is implicit in the Nevada Legislature's policy favoring the finality of convictions and the rapid resolution of habeas litigation. NRS 34.740 (requiring expeditious examination of habeas petitions by the judiciary); NRS 34.820(7) (requiring in capital habeas cases that judicial officers "render a decision within 60 days after submission of the matter for decision."); Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001) ("clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions."); Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition"). Such an approach is also consistent with preventing abusive litigation tactics designed to delay execution of sentence. See, Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("In particular, capital petitioners might deliberately engage in dilatory tactics

to prolong their incarceration and avoid execution of the sentence of death."); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"). Concern over intentional delay is heightened where the FDP is involved. Debra Cassens Weiss, Federal PDs have 40 days to explain inmate's letter saying he didn't authorize SCOTUS appeal, ABA Journal (July 1, 2014) (http://www.abajournal.com/news/article/federal_pds_have_40_days_to_explain_inmates_letter_saying_he_didnt_authoriz). Indeed, this unauthorized certiorari petition resulted in a referral *by the United States Supreme Court* to the Pennsylvania Supreme Court's Disciplinary Board. Ballard v. Pennsylvania, 2014 U.S. LEXIS 4780 (2014).

Petitioner's contentions that Barnhart does not apply to supplemental claims raised before an evidentiary hearing and that NRS 34.750(5) is inapplicable to claims raised by non-appointed counsel have no basis in law. In Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004), the Court considered whether a supplemental pleading could cure a failure to verify the underlying habeas petition. Miles involved a supplemental pleading filed in advance of an evidentiary hearing and the Court still pointed out that "the Legislature has vested the district court with broad authority to order supplemental pleadings in post-conviction habeas cases, providing that 'no further pleadings may be filed *except as ordered by the court*.'" Miles, 120 Nev. at 385, 91 P.3d at 589 (quoting, NRS 34.750(5) (emphasis added)).

Similarly, Powell did not involve a claim initially raised at an evidentiary hearing and the Court never suggested there was a different standard applicable to supplemental pleadings based on whether counsel was appointed. Powell involved a supplemental petition filed before an evidentiary hearing. Powell, 122 Nev. at 755, 138 P.3d at 456 (the State "concedes that Powell raised the claim in a supplemental pleading filed in the district court in November 2000."). In that context, Powell referenced NRS 34.750(5) and Barnhart. Id. at 758, 138 P.3d at 458. Thus, Powell is consistent with Barnhart:

> We have stated that the later subsection [NRS 34.750(5)] "vests the district court with broad authority to order supplemental pleadings in post-conviction habeas cases." Moreover, we recently held in Barnhart v. State that a district

> court has the discretion to permit a habeas petitioner to assert new claims even as late as the evidentiary hearing on the petition.

Id. at 758, 138 P.3d at 458 (quoting, Miles, 120 Nev. at 385, 91 P.3d at 589; citing, Barnhart, 122 Nev. at 303, 130 P.3d at 651-52; footnotes omitted).

After denying Petitioner owes this Court any explanation at all for sitting on his Hurst complaint until just before the one-year time bar of NRS 334.726(1) became applicable, Petitioner attempts to justify his intentional choice to delay this proceeding. Petitioner argues that decisions by the Nevada Supreme Court construing the one-year time bar of NRS 34.726(1) justify his decision to delay until just before the time bar kicked in. (Opposition to Motion to Strike, p. 19). Petitioner's position is illogical. Adjudication of questions related to the one-year time bar of NRS 34.726(1) are separate and distinct from NRS 34.750(5). However, Barnhart did address NRS 34.750(5) and concluded that leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]" Barnhart, 122 Nev. at 303, 130 P.3d at 652.

Petitioner attempts to sidestep his intentional delay by arguing that his Hurst complaint is meritorious. As evidence of this, Petitioner cites Raulf v. State, 145 A.3d 430 (Del. 2016), and Hurst v. State, 202 So.3d 40, 44 (Fla. 2016). (Opposition to Motion to Strike, p. 11). The meritorious nature of the claim is not the issue under NRS 34.750(5). Barnhart, 122 Nev. at 303, 130 P.3d at 652 (leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]"). Regardless, since the Delaware Supreme Court's decision interpreting Hurst was published on August 2, 2016, and the Florida Supreme Court's opinion on remand in Hurst was published on October 14, 2016, Petitioner was clearly on notice for months about his allegedly meritorious claim. Indeed, Hurst's publication on January 12, 2016, put Petitioner on notice of his claim.

Petitioner's most passionate complaint against NRS 34.750(5) is his argument that the State essentially made up "its newfangled post-conviction procedure[.]" (Opposition to Motion to Strike, p. 7). Petitioner alleges that Respondent's Motion to Strike is "virtually

unprecedented." (Opposition to Motion to Strike, p. 5). Petitioner indicates that he has researched capital habeas cases litigated in the Eighth Judicial District Court and found no evidence that the State acts to enforce NRS 34.750(5). (Opposition to Motion to Strike, p. 5-6). Petitioner's research is incomplete. In State v. Larry Adams, Case Number 85C069704, the State twice successfully moved to strike FPD supplemental pleadings pursuant to NRS 34.750(5). (Order Striking Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exhibits in Support of Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Leave to File Restricted Personal Information Under Seal, Motion for Evidentiary Hearing and Motion for Leave to Conduct Discovery, filed May 14, 2015, attached as Exhibit A; Order Striking Claims Two Through Ten from Petitioner's Fourth Supplement, filed November 4, 2016, attached as Exhibit B).

However, the State concedes that it exercises discretion in litigating NRS 34.750(5). Generally, the State will not move to strike without real provocation. Prosecutors realize that judges will generally err on the side of caution and will only invoke NRS 34.750(5) in the most egregious instances. This is one of those cases. The FPD's Hurst skullduggery in this proceeding is part of a larger intentional attempt to delay capital habeas litigation. The FPD has engaged in a pattern of waiting until just before the one-year deadline of NRS 34.726(1) to file Hurst claims in eighteen (18) cases currently pending before the Eighth Judicial District Court and the Nevada Supreme Court. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-

Conviction), filed January 10, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016; McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017).

Petitioner's promise "that the Federal Public Defender Services of Idaho do[es] not work in concert with any other Federal Defender offices[,]" is belied by the record. (Opposition to Motion to Strike, p. 16). The above listed 18 pleadings were filed by four different branch offices of the FPD. The Nevada FPD filed fourteen of them. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael

(C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017). The FPD Central Division of California office filed two. (Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017). The Arizona branch office filed one. (McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017). And, the Idaho FPD filed one in this case. (Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016).

Finally, Petitioner attempts to intimidate this Court into acquiescing to his intentional delay by arguing that application of NRS 34.750(5) would invite reversal in federal court. (Opposition to Motion to Strike, p. 7-8). This is simply not correct. If this Court strikes the fugitive Amended Fifth Petition, Petitioner will either pursue leave properly under NRS 34.750(5) or file another petition. NRS 34.726(1) would apply to both. The federal court would be required to respect this Court's adjudication of that procedural bar. See, Castillo v. Baker, 2016 U.S. Dist. LEXIS 25814, p. 74 (D. Nev. March 2, 2016) ("Turning to NRS 34.726 -- the state statute of limitations -- the Ninth Circuit of Appeals has rejected the argument that the Nevada Supreme Court has inconsistently applied that statute, and has held it to be adequate to support application of the procedural default defense."). Indeed, not applying NRS 34.750(5) would invite such an argument against other Nevada judges who enforced this basic rule of habeas procedure. See, Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015), cert. denied, __ U.S. __, 136 S.Ct. 1450 (2016) ("Normally, procedural default will preclude consideration of the claim on federal habeas review. However, the procedural ground at issue here, Nev. Rev. Stat. § 34.810, has been held to be inadequate to bar federal review because the rule was not regularly and consistently applied.").

This Court has broad authority to permit or deny leave to file a supplemental pleading. However, Barnhart places the burden on Petitioner to explain the delay in bringing his claim. Barnhart, 122 Nev. at 304, 130 P.3d at 652. All Petitioner needs to do is give a legitimate explanation for why the FPD delayed filing Hurst pleadings in this case and seventeen others until just before NRS 34.726(1) barred the claims. Undersigned counsel believes the FPD acted in bad faith because it is consistent with the FPD's conduct in this case and in others. Ultimately, this Court need look no further than the publication date of Hurst and the filing date of the Amended Fifth Petition to conclude that the FPD acted in bad faith. Hurst was published on January 12, 2016, and the Amended Fifth Petition was not filed until December 1, 2016. Petitioner's Hurst claim is a purely legal complaint that has been available since January 12, 2016. Petitioner has done nothing to explain why he sat on Hurst until just before the one-year time bar of NRS 34.726(1) kicked in. The FPD has not explained why it did this in 18 cases. The answer is blatantly obvious, the FPD believed that it could file just shy of the NRS 34.726(1) deadline and thereby create further delay through another round of pleading without suffering any consequences. Petitioner has been litigating this case for over thirty years. This Court should exercise its broad discretion to prevent such abusive litigation tactics by striking Petitioner's fugitive Amended Fifth Petition.

CONCLUSION

The Nevada Supreme Court has warned that rules exist for a reason and that violating them comes with a price:

In the words of Justice Cardozo,

> Every system of laws has within it artificial devices which are deemed to promote … forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, The Paradoxes of Legal Science 68 (1928). The district court should have upheld the requirements mandated in Hill and therefore should have dismissed the case against Scott.

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

Based on the foregoing, the Amended Fifth Petition should be struck as filed in violation of NRS 34.750(5) and offered without a showing of good cause as required by Barnhart.

DATED this 6th day of February, 2017.

Respectfully submitted,

STEVEN WOLFSON
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Nevada Bar #001565

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction) was made this 6th day of February, 2017, by Electronic Filing to:

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Counsels for Petitioner

/s/ E.Davis

Employee for the District Attorney's Office

JEV//ed

EXHIBIT A

EXHIBIT A

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05/14/2015 10:06:02 AM

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

LARRY EDWARD ADAMS,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 85C069704
DEPT NO: IV

Order Striking Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exhibits in Support of Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Leave to File Restricted Personal Information Under Seal, Motion for Evidentiary Hearing and Motion for Leave to Conduct Discovery

DATE OF HEARING: 4/28/15
TIME OF HEARING: 9:00 A.M.

Larry Edward Adams (Petitioner) filed a third Petition for Writ of Habeas Corpus (Post-Conviction) (Third Petition) on September 10, 2008.

Petitioner filed a Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on June 25, 2010.

Petitioner filed Exhibits to Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on June 25, 2010.

Petitioner filed a Second Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on April 15, 2011.

Petitioner filed Exhibits to Second Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on April 15, 2011.

This Court issued Findings of Fact, Conclusions of Law and Order denying Petitioner's Third Petition on February 23, 2012.

This Court entered Notice of Entry of Decision and Order on March 6, 2012.

Petitioner field a Notice of Appeal on April 3, 2012.

Petitioner filed a Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on March 20, 2015.

Petitioner filed Exhibits in Support of Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on March 20, 2015.

Petitioner filed a Motion for Leave to File Restricted Personal Information Under Seal on March 20, 2015.

Petitioner filed a Motion for Evidentiary Hearing on March 25, 2015.

Petitioner filed a Motion for Leave to Conduct Discovery on March 25, 2015.

Pursuant to NRS 34.750(3) once an attorney is appointed in a post-conviction habeas proceeding, counsel may file supplemental pleadings within 30 days of appointment or this Court's order directing a response to the initial petition. After a petitioner has the benefit of a supplemental petition filed with the assistance of counsel, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(4).

Leave of court must be granted prior to moving for reconsideration of a previously denied writ. Nevada District Court Rules (DCR) Rule 13(7); Rule of Practice for the Eighth Judicial District Court (EDCR) Rule 7.12.

Reconsideration of a previously decided issue is disfavored. Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing ... The obvious reason for this rule is that successive motions for rehearing tend to unduly prolong litigation"); 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."); Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 346 (1995) (Chapter 34 of the Nevada Revised Statutes sets forth with specificity the extent of the right to appeal in habeas proceedings and an appeal from an order denying a motion for reconsideration is not included).

THEREFORE, IT IS HEREBY ORDERED that the Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) and the Exhibits in Support of Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) are struck from the record as fugitive documents as the third Petition for Writ of Habeas Corpus (Post-Conviction) has already been ruled on; therefore, there was no pleading properly before this Court to be supplemented, as the Court did not grant leave for reconsideration, nor was there any order for the filing of supplemental pleadings pursuant to NRS 34.750(4). Additionally, the Court finds that the Defendant had enjoyed the benefit of supplementing the Third Petition on two separate occasions.

THE COURT FURTHER ORDERS, all other pending motions are denied as moot, based upon the Order on Defendant's Third Supplement to Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 8 day of May, 2015.

KERRY EARLEY
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 14th day of May, 2015, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

MICHAEL PESCETTA
Assistant Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101

By: _____
Employee for the District Attorney's Office

JEV//ed

EXHIBIT B

EXHIBIT B

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CLERK OF THE COURT

ORDR
STEVEN B. WOLFSON
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Nevada Bar #001565
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200 Lewis Avenue, 3rd Floor
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(702) 671-2700
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

LARRY EDWARD ADAMS,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 85C069704
DEPT NO: IV

ORDER STRIKING CLAIMS TWO THROUGH TEN FROM PETITIONER'S FOURTH SUPPLEMENT

DATE OF HEARING: August 25, 2016
TIME OF HEARING: 11:00 A.M.

Petitioner filed his Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) on April 26, 2016. On May 2, 2016, the State filed a Motion to Strike Fourth Supplement to Petition for Writ of Habeas Corpus. On May 9, 2016, Petitioner filed a Motion and Notice of Motion for Leave to File Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). On May 17, 2016, the State filed the Opposition to Motion for Leave to File Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). On May 20, 2016, Petitioner filed his Reply to Opposition to Motion for Leave to File Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). On July 11, 2016, the State filed a Supplement to Motion to Strike Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). On August 15, 2016, Petitioner filed his

Supplement to Opposition to Motion to Strike Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction).

This Court held hearings related to striking the Fourth Supplement to the Third State Petition on May 26, 2016, August 18, 2016, and August 25, 2016. This Court issued a Minute Order adjudicating the State's Motion to Strike on October 19, 2016.

THEREFORE, IT IS HEREBY ORDERED that claims two through ten of Petitioner's Fourth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) are struck from the record.

DATED this 2nd day of November.

KERRY EARLEY
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Order Striking Claims Two Through Ten From Petitioner's Fourth Supplement, was made this 31st day of October, 2016, by facsimile transmission to:

MICHAEL PESCETTA
RANDOLPH M. FIEDLER
Assistant Federal Public Defenders
(702) 388-5819

BY: _____
Employee,
for the District Attorney's Office

MEMORY TRANSMISSION REPORT

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SUBJECT: Larry Adams, C069704, Order Striking Claims 2-10 from Petitioner's Fourth Supplement.

DATE: October 31, 2016

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DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII Date of Hearing: Time of Hearing: (Death Penalty Case)

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO MOTION TO DISMISS

In opposition to Petitioner Samuel Howard's petition for habeas corpus, the State relies on outdated law, misinterpreted precedents, and imaginary procedural rules. Because the State's arguments are all meritless, its motion to dismiss should be denied, and Mr. Howard's death sentence should be vacated.

DATED this 27th day of March 2017.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

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MEMORANDUM OF POINTS AND AUTHORITIES

On both the procedure and the substance, the State's arguments are insubstantial.[1] Mr. Howard will first address the procedural posture of the petition and demonstrate that it is properly before the Court for merits review. Then, he will take up the substance and show why relief must be afforded.

I. The Petition Is Not Procedurally Barred

In an attempt to prevent Mr. Howard from having his compelling constitutional claim addressed by the Court, the State asserts a series of procedural defenses. All are inapposite.

A. The Petition Sufficiently Addressed Procedural Bars

As an initial matter, Mr. Howard will correct the State's unsupported assertion that Mr. Howard fell short of an obligation to more specifically raise and address procedural bars. *See* Opposition & Motion to Dismiss, filed Nov. 2, 2016, at 20–21 (hereinafter "Motion to Dismiss" or "MTD"). Curiously, while faulting Mr. Howard for supposedly neglecting his pleading requirements, the State ignores the statute that actually outlines those requirements. In the relevant statute, the Nevada legislature laid out the material that must be included in a post-conviction petition. *See* NRS 34.735. As relevant here, the statute compels inmates to "list briefly what grounds" for relief were not presented earlier, and to supply the reasons they were not presented. *Id.* Along the same lines, the statutory form asks the inmate whether he is "filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal?" *Id.* "If so," the form continues, "state briefly the reasons for the

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[1] The petition addressed in this reply is the original version, filed on October 5, 2016. That petition raises a single claim, denominated there as Claim One. On December 1, 2016, Mr. Howard filed an amended petition, adding Claim Two. At a hearing held on March 17, 2017, this Court struck the amended petition and instructed the parties to litigate the original. In the near future, Mr. Howard will be filing a motion seeking leave to incorporate Claim Two into the petition. By addressing this reply only to Claim One, Mr. Howard does not concede that the remaining litigation should deal only with Claim One. If the Court grants the motion for leave to amend, Mr. Howard believes it would then be appropriate for the State to file an opposition and motion to dismiss the amended petition, and for Mr. Howard to then file a reply in support of the amended petition. Undersigned counsel have not yet filed the motion for leave to amend because they have been focused on completing the instant reply in compliance with the Court's March 27, 2017 deadline. They will now turn their attention to the motion for leave to amend and will file it as soon as possible.

delay." *Id.* Mr. Howard fully complied with these provisions in his post-conviction petition, where he explained that he had not presented the claim in his earlier post-conviction petitions because it was not available until *Hurst v. Florida*, 577 U.S. ---, 136 S. Ct. 616 (2016) ("*Hurst I*"), was decided, and where he further explained that he did not present the claim within one year of remittitur on his direct appeal for the same reason. *See* Pet. for Writ of Habeas Corpus, filed Oct. 5, 2016, at 6 (hereinafter "Petition" or "Pet."). Mr. Howard therefore satisfied the terms of the controlling statute.

Without citation, the State proposes, strikingly, that the failure of Mr. Howard to discuss procedural bars as much as the State would have liked represents "an admission that Petitioner cannot demonstrate good cause" or prejudice. MTD, at 20.

It should also be noted that no prejudice has occurred as a result of Mr. Howard's decision to draft his petition in accordance with NRS 34.735, rather than to address procedural bars with enough detail so as to satisfy the State. Consistent with NRS 34.735, Mr. Howard stated his justification for the petition being successive and for it falling beyond the usual one-year deadline. That justification was simple: *Hurst I*, which did not exist when the deadline lapsed and when the first post-conviction petition was filed. *See* Pet., at 6. The State was capable of addressing Mr. Howard's procedural excuse, and it did so repeatedly. *See* MTD, at 14–17, 21–22. The State was likewise able to engage with every other legal issue upon which this case turns, including the retroactivity of *Hurst I* and the merits of the claim. *See* MTD, at 23–28. It could have dealt with prejudice too, since Mr. Howard addressed the matter in his petition, *see* Pet., at 7–8, though the State declined to do so. In sum, the State got more than sufficient notice here and its ability to litigate the case was not impaired in the slightest.

It would be inappropriate to dismiss a petition alleging a serious constitutional violation in a capital case on the basis of an imaginary pleading deficiency, when all of the issues are fully briefed and ripe for decision. *Cf. Bejarano v. State*, 122 Nev. 1066, 1071, 146 P.3d 265, 269 (2006) (resolving a legal issue in a capital case, even though it had not been raised below, because "the relevant facts of this case are not in dispute; both parties have had an opportunity before this court to brief this issue and orally argue their positions; and this issue is significant

and needs to be decided"). Such a dismissal would also needlessly increase the likelihood of a remand from the Nevada Supreme Court for further proceedings, as that court would presumably wish to see the claim fully adjudicated now that it has been comprehensively briefed by both sides. *See id.*

Finally, a brief word must be said about the language used by the State in its section on the supposed pleading deficiencies in Mr. Howard's petition. In unusually personal terms, the State attacks the integrity of undersigned counsel for not spelling out in more detail the procedural defenses that the State itself could—and did—easily raise. *See* MTD, at 20–21 & n.9 (accusing counsel of "defense misconduct," "skullduggery," and of taking part in a mysterious, nationwide cabal of lawyers harboring "religiously militant opposition to the death penalty").

Such language would be startling under any circumstances. It is especially startling here, where undersigned counsel modeled their petition on a statute enacted to guide the drafting of post-conviction petitions, where the State offers no caselaw to substantiate its opinion that Mr. Howard forfeited any procedural-bar arguments, and where the State had no difficulty in addressing all of the legal issues. Undersigned counsel are simply trying as best as they can to ensure their client is not executed unconstitutionally. They lodged their claim and the State responded. The criminal justice system would seem to be operating in a wholly uncontroversial manner, just as it was intended to operate. It is unclear why the State has responded to a strictly legal petition in such an ad hominem fashion, and troubling that the State would do so instead of focusing on the actual issues raised by the proceeding.

The emotional tone of the State's comments appears to arise in part from a personal opinion about Federal Public Defender offices as a whole, *see id.* at 20 n.9, but the relevance of that opinion to the case at hand is uncertain.

First, the Federal Defender Services of Idaho do not work in concert with any other Federal Defender offices. Their sole loyalty is to their clients. They are not accountable for litigation decisions made by any other Federal Defender attorneys, just as counsel for the State is not accountable for litigation decisions made by lawyers in every other prosecutor's office in the country. If he were, one could of course provide numerous examples of prosecutorial

misconduct elsewhere, but undersigned counsel do not share the State's theory of guilt-by-job-title.[2]

Second, even if every action taken by every Federal Defender attorney were attributable to every other Federal Defender attorney, despite the complete independence of each office, the State's footnote says nothing at all about Federal Defenders, nor about unethical defense behavior. The first two cases in the State's footnote did not involve Federal Defenders, and merely recognize the obvious truth that death row inmates have an interest in not being executed. *See id.* If that is the State's grievance, it is offended not by unscrupulous litigation, but by the very idea that a defendant might resist the State's plan to kill him.

The final two sources in the State's footnote both refer to situations involving disagreements between former Chief Justice Castille of the Pennsylvania Supreme Court and the Capital Habeas Unit for the Federal Community Defender Office in Philadelphia. *See id.* Many of those disagreements stemmed from Chief Justice Castille's view that Federal Defenders should "be precluded from participation in state collateral proceedings." *Commonwealth v. Spotz*, 610 Pa. 17, 193, 18 A.3d 244, 349 (2011). What the State neglects to point out is that Chief Justice Castille's view was firmly rebuffed by the Third Circuit. *See In re Commw.'s Mot. to Appt. Counsel Against or Directed to Defender Ass'n of Phi.*, 790 F.3d 457, 475–77 (3d Cir.

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[2] Interestingly, while blaming undersigned counsel for supposed misbehavior in other cases, engaged in by other offices with which the undersigned have no relationship, counsel for the State minimizes misbehavior committed by his own office in this very case. In its background section, the State acknowledges that one of the Clark County prosecutors who handled the Howard trial—Dan Seaton—was found by the Nevada Supreme Court to have committed misconduct. *See* MTD, at 9. Sixteen years later, the State explains away Mr. Seaton's incendiary statements at sentencing as acceptable on the basis that they were only rendered unlawful by subsequent authority. *See* MTD, at 9, at nn. 5–6. That explanation is tenuous, given that the rule of law transgressed by Mr. Seaton—that prosecutors are not to interject their "personal beliefs into the argument"—dates back a hundred years. *See Collier v. State*, 101 Nev. 473, 479–80, 705 P.2d 1126, 1130 (1985) (sampling the enormous body of precedent behind the rule). Incidentally, when Mr. Seaton was referred to the Bar for potential disciplinary action by the Nevada Supreme Court, it was not just for his inflammatory speeches in *Howard*, but as a result of "a history of persistent disregard for established rules of professional conduct," for which he had been repeatedly admonished by the court, *see Howard v. State*, 106 Nev. 713, 722 n.1, 800 P.2d 175, 180 n.1 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000), another fact that goes unmentioned by the State.

2015), *cert. denied*, -- U.S. ---, 136 S. Ct. 994 (2016); *see also id.* at 479, 481–82 (McKee, C.J., concurring) (chalking the conflict up to an "objection . . . that the Federal Community Defender is providing too much defense," and wondering why Chief Judge Castille appeared to think that purely financial disputes deserve more attention than capital cases). In another recent decision omitted by the State, the United States Supreme Court found that Chief Justice Castille violated the due process rights of a death row inmate by refusing to recuse himself from an appeal even though Chief Justice Castille had personally approved of the decision to seek death against the inmate. *See Williams v. Pennsylvania*, -- U.S. ---, 136 S. Ct. 1899, 1905–10 (2016). At the very least, Chief Justice Castille is not the most credible spokesman for the State to look to on this issue.

The State's distracting and misleading diatribe about capital defense practices has no bearing here, and does not change the fact that Mr. Howard's petition is adequately pled and allowed the State to comprehensively respond. Notwithstanding the personal feelings of counsel for the State, there is no cause for dismissal on the basis of any imagined pleading deficiencies.

B. The Petition Is Not Time Barred

Having shown that the State was fully able to brief procedural bars, the next question is whether those bars apply. Mr. Howard will take them one by one, and demonstrate why none of them can preclude merits review. He will begin with timeliness.

Typically, a post-conviction petition must be filed within one year from when the Nevada Supreme Court issues its remittitur in the direct appeal. *See* NRS 34.726(1). However, the statute does not defeat merits review where a petitioner can show good cause and prejudice. *See, e.g.*, *State v. Boston*, 131 Nev. ---, ---, 363 P.3d 453, 455 (2015); *Wilson v. State*, 127 Nev. 740, 744, 267 P.3d 58, 60 (2011). Mr. Howard can show both.

1. Mr. Howard Has Good Cause Because His Claim Is Based On *Hurst* I, Not *Ring*[3]

Under unambiguous Nevada law, there is good cause for missing the one-year deadline codified in NRS 34.726(1) if the claim was raised "within a reasonable time after it became

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

available." *Wilson*, 127 Nev. at 745, 267 P.3d at 61; *accord Boston*, 131 Nev. at ---, 363 P.3d at 455. The Nevada Supreme Court has recently determined that one year is a "reasonable time" under NRS 34.726(1). *See Rippo v. State*, 132 Nev. Adv. Op. 11, --, 368 P.3d 729, 740 (2016), *vacated on other grounds*, --- S. Ct. ----, 2017 WL 855913 (2017) (per curiam). When a claim is based on a new judicial opinion, the release of the opinion sets the reasonable-time clock running. *See Boston*, 131 Nev. at ---, 363 P.3d at 455; *Wilson*, 127 Nev. at 745, 267 P.3d at 61.[4] In a situation like this, therefore, a petitioner has one year from the issuance of the intervening authority upon which he is relying. *See Wilson*, 127 Nev. at 744, 745, 267 P.3d at 60, 61 (finding good cause where the petition was filed on November 21, 2005, and was based on *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), which was handed down on December 29, 2004). Mr. Howard's petition is based on *Hurst I*, and was filed on October 5, 2016, about nine months after the *Hurst I* opinion came out on January 12, 2016. Following *Wilson*, then, Mr. Howard's petition falls comfortably in the good-cause column.[5]

Pushing back against that commonsense approach, the State searches for a legal foundation that might have existed earlier than *Hurst I* that would have enabled Mr. Howard's claim. It finds such a foundation in *Ring*. *See* MTD, at 14. Because *Ring* was released in 2002, the State reasons, Mr. Howard's claim became available with the issuance of remittitur in his fourth post-conviction proceeding, where the Nevada Supreme Court did its appellate reweighing. *See id.*[6] Although the State's logic is correct, its starting point is not: *Ring* did not in fact give Mr. Howard a legal basis to raise his reweighing claim.

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[4] A petitioner only has good cause to file a petition based on a new authority if the new authority is retroactive. *See, e.g.*, *Wilson*, 127 Nev. at 745, 267 P.3d at 60. Mr. Howard establishes *Hurst I*'s retroactivity below. *See infra* at 23–36.

[5] The State does not argue that Mr. Howard's petition was unreasonably delayed *if Hurst I* made his claim available. Given that there is a one-year deadline from the date the claim becomes available, and given that the petition was filed within a year of *Hurst I*, the State must accept that if *Hurst I* provided the legal foundation for the petition, it was filed within a reasonable amount of time.

[6] The State's motion to dismiss contains some language that could be read to imply that Mr. Howard's claim was available even earlier, perhaps with the resolution of his direct appeal. *See* MTD, at 14. If the State intends to articulate that argument, it is patently off-base. The appellate

In order to understand why *Ring* did not enable Mr. Howard's claim, it is important to understand that death penalty jurisprudence demarcates sharply between eligibility and selection. The United States Supreme Court has succinctly summarized the difference between the two:

> [O]ur cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S. Ct. 2630, 2634 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Ibid.* In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.* at 972, 114 S. Ct., at 2634–2635.

Buchanan v. Angelone, 522 U.S. 269, 275, 118 S. Ct. 757, 761 (1998). *Ring* declared Arizona's capital regime unconstitutional under the Sixth Amendment because in Arizona, "the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." 536 U.S. at 588, 122 S. Ct. at 2432. In other words, *Ring* was fundamentally about *eligibility* for the death sentence. *See, e.g.*, *Styers v. Ryan*, 811 F.3d 292, 296 (9th Cir. 2015) (describing *Ring* as announcing "that defendants are entitled to a jury determination of any fact on which their *eligibility* for the death penalty is conditioned" (emphasis added)), *cert. denied*, --- U.S. ---, --- S. Ct. ---- (2017). *Ring* did not touch upon the selection component of a death penalty sentencing. *See United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013) ("To be sure, the Supreme Court has held that the Sixth Amendment requires juries to find aggravating factors necessary for the imposition of the death penalty beyond a reasonable doubt, *see Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), but it has never extended this requirement to juries' weighing of aggravating and mitigating factors."); John G. Douglass, *Confronting Death: Sixth Amendment Rights At Capital Sentencing*, 105 Colum. L. Rev. 1967, 1971 (2005) ("*Ring* attempts to draw a bright line, assigning death-eligibility factfinding to the jury, while leaving the ultimate exercise of sentencing discretion—the selection process—beyond the reach of the Sixth Amendment.").

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reweighing that Mr. Howard attacks in this action occurred in the Nevada Supreme Court's 2014 opinion denying him relief on his fourth post-conviction petition. By definition, Mr. Howard could not have challenged the reweighing until it took place.

Unlike *Ring*, the *Hurst I* decision did reach the selection phase. *Hurst I* nullified Florida's capital scheme for affording judges too much say in the process, contrary to the Sixth Amendment. It did so partly, it is true, on eligibility grounds. *See Hurst I*, 577 U.S. at ---, 136 S. Ct. at 622 ("[T]he Florida sentencing statute does not make a defendant *eligible* for death until findings by the court that such person shall be punished by death." (emphasis altered) (internal quotation marks omitted)). But *Hurst I*'s rationale is much broader than *Ring*'s, and strikes at the core of *selection* as well. Most significantly, the *Hurst I* court repeatedly framed its holding in terms of a jury's constitutionally guaranteed right to make all findings "*necessary* to impose a sentence of death." *Id.* at ---, 136 S. Ct. at 621 (emphasis added); *see also id.* at ---, 136 S. Ct at 619, 624. One determination that is indisputably "necessary to impose a sentence of death" is presented by the ultimate choice in the selection phase of a capital trial, where the decisionmaker is asked: upon weighing the aggravating and mitigation, should this person live or die? *See id.* at ---, 136 S. Ct at 622 (striking down the Florida statute because "[t]he trial court alone must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' *and* '[]that there are *insufficient mitigating circumstances to outweigh the aggravating circumstances*." (quoting Fla. Stat. § 921.141(3) (West 2010) (amended 2017)) (first alteration added) (emphasis altered)). The plain language of *Hurst I* thus obligates juries to make all requisite findings of fact not just when a defendant is determined eligible for death, but also when it is determined that death is in fact the appropriate punishment.

In passing, the State itself appears to recognize that *Ring* did not make Mr. Howard's claim available. It posits that *Ring* may in fact have "rejected Petitioner's contention," because the Court there announced that it was "'not question[ing] the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator.'" MTD, at 25 (quoting *Ring*, 536 U.S. at 597, n.4, 122 S. Ct. at 2437, n.4). In quoting this passage, and in citing an Oklahoma case that found appellate reweighing permissible under *Ring*, *see* MTD, at 26–27, the State puts its finger on the reason why Mr. Howard's claim could not have been made until *Hurst I*. As the State rightly says, "[a] jury's factual determination of whether a defendant is death eligible is *all Ring* requires." MTD, at 27 (emphasis in original). Mr. Howard

could not agree more. It was only in 2016, with *Hurst I*, that the Supreme Court targeted the judicial role in the weighing process, and it was therefore only in 2016 that Mr. Howard could file his petition.

A majority of justices on the Delaware Supreme Court adopted precisely the same reading of *Hurst I*. That court was asked the question whether, in light of *Hurst I*, a jury, and not a judge, must "find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam). Chief Justice Strine wrote an instructive concurring opinion in *Rauf*, in which two other justices joined. *See id.* at 434–82 (Strine, C.J., concurring). Because five justices participated in *Rauf*, Chief Justice Strine's opinion represented the views of a three-judge majority of the court. In his exhaustively reasoned concurrence, Chief Justice Strine examined why *Hurst I* invalidates any judicial fact-finding at the selection phase. *See id.* at 435–79 (Strine, C.J., concurring). Consistent with the rationale set forth above, Chief Justice Strine saw that it was "impossible to embrace a reading of *Hurst*" that cabins the opinion to eligibility, because such a reading conflicted with the "plain meaning" of the opinion when it commanded "that a jury must 'find each fact *necessary* to impose a sentence of death.'" *See id.* at 436, 460 (emphasis in original) (quoting *Hurst I*, 577 U.S. at ---, 136 S. Ct. at 619). Chief Justice Strine also commented that this understanding of "necessary" was harmonious with how Justice Sotomayor, the author of *Hurst I*, used the term in a previous opinion, indicating that it was presumably how she used it in *Hurst I* as well. *See id.* at 460 (citing *Woodward v. Alabama*, --- U.S. ----, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of cert.)). As Chief Justice Strine remarked, "[i]f when *Hurst* said 'necessary,' it meant that," then the decision must encompass selection in addition to eligibility. *Id.* at 465.

The Florida Supreme Court has ruled to the same effect. After *Hurst I* was remanded to it, the Florida court took up the question of just which factual findings were in the exclusive domain of the jury. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016), ("*Hurst II*"), *cert. pet. filed*, No. 16-998 (Feb. 16, 2017). Its answer cuts heavily in favor of Mr. Howard's position:

> Upon review of the decision in *Hurst v. Florida*, as well as the decisions in *Apprendi*[7] and *Ring*, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . [U]nder Florida law, the death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances. Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Id. at 53 (emphasis in original) (internal quotation marks omitted) (citations omitted). The Florida Supreme Court is the very body that originally decided *Hurst* and then had its decision reversed. It is accordingly in a unique position to understand the significance of the United States Supreme Court's opinion. With the benefit of that position, the Florida Supreme Court has concluded that *Hurst I* proscribes *any* judicial fact-finding necessary to a death sentence, and that such fact-finding includes the weighing of aggravation against mitigation in the selection phase.

The Ohio Supreme Court has taken the same sound approach as its sister courts in Delaware and Florida. In *State v. Kirkland*, 140 Ohio St. 3d 73, 87, 15 N.E.3d 818, 834 (2014), the Ohio Supreme Court found, prior to *Hurst I*, that prosecutorial misconduct occurred at a capital sentencing, but that the misconduct did not compel a remand because the appellate "court's independent sentence evaluation would cure any prejudice the argument had caused." Following that decision, the Supreme Court released its decision in *Hurst I*. On the basis of *Hurst I*, Mr. Kirkland then filed a motion for a new penalty-phase hearing, pointing out that *Hurst I* prohibited such appellate reweighing. *See* Ex. 1, at 4–5 (arguing in the motion that "*Hurst* now makes clear that the independent review and conclusion reached by the majority of this Court violated Kirkland's Sixth Amendment rights. . . . The jury's determination was invalidated, and the findings of four justices could not replace the jury's verdict." (internal

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[7] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

quotation marks omitted)). The Ohio Supreme Court accepted Mr. Kirkland's argument, remanding for a new penalty-phase hearing. *See State v. Kirkland*, 145 Ohio St. 3d 1455, 49 N.E.3d 318 (Ohio 2016) (table). Needless to say, if it were the case—as the State maintains—that *Ring* makes possible challenges to appellate reweighing, then the Ohio Supreme Court would not have returned Mr. Kirkland to the trial court for a new punishment to be determined. Indeed, if *Ring* were the foundation for such challenges, the Ohio Supreme Court would not have engaged in appellate reweighing in its 2014 decision to begin with—it would have remanded then and there. The court's action is therefore powerful evidence that *Hurst I* enabled appellate reweighing challenges, not *Ring*.

These decisions by the highest courts of Delaware, Florida, and Ohio are well-grounded and give effect to the unequivocal text of *Hurst I* itself. Each of them recognizes that *Hurst I* applies equally to selection as to eligibility. Moreover, it can be inferred from each of the decisions that *Ring* itself concerned only eligibility, as the State itself concedes here, and that it was *Hurst I* alone that expanded its effect to selection. For the state supreme courts in Delaware, Florida, and Ohio had all interpreted *Ring* earlier, and none of them held—before *Hurst I*—that judges could not perform the selection function. *See, e.g.*, *State v. Small*, 2011 WL 1326372, at *2 (Del. Super. Ct. Jan. 20, 2011) (unpublished disposition) (holding that *Ring* does not require the jury to perform the weighing of mitigation against aggravation in Delaware's death sentencing system); *Hoskins v. State*, 965 So. 2d 1, 21–22 (Fla. 2007) (rejecting argument that Florida death sentence was unconstitutional under *Ring* where trial judge weighed aggravating and mitigating circumstances); *see also State v. Osie*, 140 Ohio St. 3d 131, 166, 179–81, 16 N.E.3d 588, 624, 634–35 (2014) (engaging in judicial reweighing to "cure" trial court errors after *Ring* but before *Hurst I*); *id.* at 185–86, 16 N.E.3d at 638–39 (O'Neill, J., dissenting) (arguing the majority's reweighing violated *Ring*). It was *Hurst I* that authorized those courts to invalidate judicial weighing, and it is consequently *Hurst I* that makes such claims available, in Nevada and elsewhere.

Another aspect of *Hurst I* cements its status as the unique trigger for Mr. Howard's petition. As discussed above, *Ring* deals only with the Sixth Amendment right to a jury trial.

See supra at 9. *Hurst I* deals in addition with the Sixth Amendment right to a reasonable-doubt standard. *See supra* at 10. In Mr. Howard's case, the Nevada Supreme Court violated that latter right by conducting its reweighing under a lesser standard. *See infra* at 14–15. He could not challenge that violation until *Hurst I*.

In summary, because Mr. Howard's petition was filed within a reasonable time of *Hurst I*, he has good cause for its untimeliness under NRS 34.726(1).

2. Mr. Howard Can Show Prejudice

Once good cause has been established, prejudice becomes the next hurdle. *See Wilson*, 127 Nev. at 745, 267 P.3d at 61. Mr. Howard surmounts it with ease.

"To demonstrate actual prejudice," Mr. Howard "must show error that worked to his actual and substantial disadvantage." *Boston*, 131 Nev. at ---, 363 P.3d at 455. It is difficult to imagine a situation in which prejudice is as apparent as it is here. The error committed by the Nevada Supreme Court was to engage in appellate reweighing after nullifying an aggravator, when the Constitution restricts such fact-finding to juries. In the absence of that error, Mr. Howard's case would have been sent back to the trial court for a new penalty phase. *See supra* at 12–13 (discussing how the Ohio Supreme Court took this course after finding the same error). The deprivation of a new sentencing hearing is self-evidently an "actual and substantial disadvantage," *Boston*, 131 Nev. at ---, 363 P.3d at 455, and prejudice is plain. An analogous situation is that of ineffective-assistance at the plea-bargaining stage, where prejudice flows not from the reasonable likelihood of getting an acquittal, but from the reasonable likelihood that—were it not for the error—the defendant would have forced the government to try him. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985) (clarifying that when a defense attorney incompetently advises a client to plead guilty, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

If the Court does consider prejudice in more detail, the result remains the same. First, as discussed elsewhere, the constitutional error that occurred here was, in part, that the Nevada Supreme Court failed to reweigh the aggravation and mitigation under a reasonable-doubt

standard. *See supra* at 10. Had the court used the appropriate test, reasonable doubt, it would have been applying "the highest standard." *United States v. Rutledge*, 28 F.3d 998, 1005 (9th Cir. 1994). Under that standard, Mr. Howard demonstrates prejudice. The aggravation in this case was not particularly strong. Mr. Howard was convicted of murdering one person, an adult male, without subjecting him to any pain and without subjecting the victim to any sexual abuse. At the penalty phase, the prosecution presented only two witnesses, both of whom described a single armed robbery that did not result in any death or physical injury. *See* 15 ROA 2491–2518. The death sentence rested on just two aggravators, one for the prior robbery, and one because the murder also involved a robbery. Against that limited aggravation were balanced several significant categories of mitigation, including that Mr. Howard's father murdered his mother when he was a child, that Mr. Howard performed combat duty in Vietnam, and that he had been treated for mental illness. *See* 15 ROA 2538–56.

In overview, this was plainly a situation in which a life sentence was possible. *See Canape v. State*, No. 62843, 2016 WL 2957130, at *3 (Nev. May 19, 2016) (unpublished disposition) (finding prejudice on a claim of ineffective assistance at a capital penalty phase in part because "the murder, while reprehensible, does not qualify as 'the worst of the worst'"); *see also Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002) (doing the same and emphasizing that it was "not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances" (internal quotation marks omitted) (citation omitted)). Indeed, at least one juror experienced great difficulty with the prospect of a death sentence. *See* 15 ROA 2463, 2472, 2473 (reflecting the fact that a juror came to the court, "almost in tears," because she was "having a hard time dealing with the sentencing" and "a hard time being the one to push the button"). That juror's statements provide proof that the weighing determination could easily have come out differently. With the proper standard set at the highest test known to the law, it would have.

Moreover, when considering whether the Nevada Supreme Court prejudiced Mr. Howard by denying him a resentencing in 2014, it is appropriate to consider what a resentencing would look like *now*. Simply put, there is a wealth of powerful mitigation evidence that could be

presented at a new sentencing and was neglected at his original one. In his previous state post-conviction action, Mr. Howard alleged ineffective assistance of trial counsel for their failure to bring forward or sufficiently develop an enormous amount of mitigating material, including:

- That he witnessed his father murder his mother and infant sister at the age of three;
- That he suffered heinous child abuse at a juvenile detention center, where he was sent only because his family had abandoned him, and where the occupants were routinely exposed to tremendous sexual, physical, and emotional abuse by the staff and other children, given too little clothing and unsanitary food, and forced to labor under slave-like conditions in the center's fields in close proximity to intense pesticides;
- That he served as a minesweeper while in the Marines during the Vietnam war, and acquired post-traumatic stress disorder as a result.

See Am. Pet. for Writ of Habeas Corpus, filed Feb. 24, 2009 (hereinafter "Fourth PCR Pet."), at 19–73.

The Nevada Supreme Court provided a snapshot of Mr. Howard's tragic background in its most recent opinion in his case, where it described the new material as "a plethora of mitigating evidence" that "appears credible and constitutes evidence relevant to the sentencing decision." *See Howard v. State*, No. 57469, 2014 WL 3784121, at *4 (Nev. 2014) (table). The voluminous evidence of this mitigation is recited in the amended petition for post-conviction relief, filed in this Court on February 24, 2009. *See* Fourth PCR Pet., at 19–73; *see also* N.R.C.P. 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); NRS 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

Although some of these facts were touched upon glancingly in Mr. Howard's sentencing hearing, *see* 15 ROA 2538–56, a cursory comparison of that transcript with the traverse reveals that trial counsel barely scratched the surface of the available mitigation. One critical area of mitigation that was neglected entirely at Mr. Howard's sentencing was that of his experience at

Mt. Meigs, a horrific juvenile detention center that imposed slave-like conditions on young African-American children and exposed them to appalling physical and sexual abuse. *Compare id.*, *with* Fourth PCR Pet., at 40–46; *see also Andrews v. Davis*, 798 F.3d 759, 770 (9th Cir. 2015) (characterizing Mt. Meigs as "appalling" and describing its conditions). Every other area of mitigation addressed at sentencing was recounted by Mr. Howard himself, who did so in a mere eighteen pages of transcript. *See* 15 ROA 2538–56. Had trial counsel presented the mitigation in detail and with full accounts from the numerous witnesses referred to in the traverse—whose credibility would have been far higher than Mr. Howard's—rather than the incomplete, anemic, and poorly told story that they did tell, he would have been considerably more humanized in the eyes of the jury, and a non-death sentence would have been much more likely. *See Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1254 (11th Cir. 2016) (remanding for an evidentiary hearing because "[w]hile trial counsel presented some mitigation evidence during the penalty phase through Mr. Daniel's mother, the description, details, and depth of abuse in Mr. Daniel's background that he brought to the attention of the state courts in his habeas proceedings far exceeded anything the sentencing jury and judge were told"); *McNish v. Westbrooks*, 149 F. Supp. 3d 847, 855 (E.D. Tenn. 2016) (granting relief on an ineffectiveness claim, even though sentencing counsel presented some mitigation, because all they did was "scratch the surface of Petitioner's grim family and social history," and thus their errors could not "be deemed inconsequential regardless of the cruel nature of the crime in question").

It also warrants mention that the prosecutorial misconduct found by the Nevada Supreme Court would presumably not recur at a new sentencing, notwithstanding the State's continuing disagreement with the court's decision to censure the prosecutor for his "history of persistent disregard for established rules of professional conduct regarding improper arguments before a jury." *Howard*, 106 Nev. at 722 n.1, 800 P.2d at 180 n.1; *see supra* at 6 n.6 (discussing the State's ongoing refusal to acknowledge the misconduct). Similarly, Mr. Howard would not be represented at a resentencing by attorneys whose service was compromised by egregious conflicts between Mr. Howard and their office, which employed as a supervisor a friend of the victim and employed another attorney who had expressed the desire to see Mr. Howard executed.

See generally Final Am. 3d State Pet. For Post-Conviction Relief, filed Aug. 20, 2003, at 16–21; *see also* Order Den. 3d State Pet. for Post-Conviction Relief, filed Dec. 6, 2010, at 2, 3 (noting that Mr. Howard's first assigned attorney was removed from the case by the trial court because "he was a friend of the victim," and that this relationship had "created mistrust in Howard" and impaired his cooperation). With one less aggravator in play, scads more mitigation at issue, a gross conflict between defense counsel and their client eliminated, and serious prosecutorial misconduct removed, there would be an immense difference between the first penalty phase and a second.

With a constitutionally adequate penalty phase, a death sentence would be that much less likely. The appellate reweighing plainly prejudiced Mr. Howard, and if harmless error applies, the error is easily categorized as harmful. That being the case, Mr. Howard has established that constitutional error committed by the Nevada Supreme Court caused him "actual and substantial disadvantage," *Boston*, 131 Nev. at ---, 363 P.3d at 455, and the prejudice standard is met.

C. The Petition Is Not Barred As Successive Or Waived

Overlooking the plain language of the statute that it invokes, the State submits that Mr. Howard's petition "is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ." MTD, at 16. It is neither.

NRS 34.810(1)(b)(2) provides that a petition should be dismissed if the claim could have been "[r]aised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief." For the reasons outlined above, Mr. Howard's petition could not have been filed until *Hurst I*, and his most recent post-conviction petition was filed in 2007, nine years before *Hurst I* came out. Section 34.810(1)(b)(2) is, by its own terms, inapplicable.

So is NRS 34.810(2), which states, in full:

> A second or successive petition must be dismissed if the judge or justice determines [1] that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, [2] if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Mr. Howard's claim does not fall within either prong of the provision. It does "allege new or different grounds for relief" and thus escapes the first prong. On the second prong, a

claim is an abuse of the writ if it "could . . . have been raised earlier." *Bejarano*, 122 Nev. at 1072, 146 P.3d at 269. Based as it was on *Hurst I*, Mr. Howard's claim could not have been. Given the statute's plain language, Mr. Howard's petition is not barred by NRS 34.810(2).

Since Mr. Howard's petition is not covered by either NRS 34.810(1)(b)(2) or by NRS 34.810(2), the State's reliance on those provisions can be rejected out of hand. However, if the Court disagrees and regards the provisions as in play, Mr. Howard can show good cause and prejudice to overcome the bars for the same reasons surveyed above. *See supra* at 7–18; *see also Bejarano*, 122 Nev. at 1072, 146 P.3d at 270 (applying the same good cause and prejudice analysis for defaults under both the timeliness provision of NRS 34.726(1) and the successive provisions of NRS 34.810). No matter how the Court approaches the questions of successiveness and waiver, they do not foreclose relief.

D. The Provision Is Not Barred By Laches

The State's laches argument, *see* MTD, at 15, is even more misguided than its arguments on timeliness and successiveness.

Nevada's laches rule permits a court to dismiss delayed petitions where the delay has prejudiced the State in certain respects. *See* NRS 34.800. The most sensible way for the Court to dispatch the State's overzealous laches defense is for it to simply find, in an exercise of discretion, that laches was not meant to be used in a scenario like this one. Notably, laches allows, but does not require, a court to dismiss a petition for delay. *See* NRS 34.800(1) ("A petition *may* be dismissed if" the specified grounds are satisfied (emphasis added)). In a case with analogous facts, the Nevada Supreme Court exercised its discretion in the suggested manner:

> The State also alleges that the passage of time has prejudiced it and cites NRS 34.800, which provides courts the discretion to dismiss a petition if delay in its filing prejudices the State. We conclude that such relief is not appropriate here. The State points out that the original penalty hearing was almost 15 years ago, that it will be difficult to gather witnesses that came from California, Oklahoma, Texas, and Pennsylvania, and that the witnesses' memories will have faded. But the lengthy time that has passed in this case is not attributable to delay by Powell. Powell's judgment of conviction was entered in June 1991. On direct appeal, this court erroneously decided that a new rule of criminal procedure announced by the Supreme Court soon after Powell's trial did not apply to his case. It was not until

> 1997 that this court, after remand from the Supreme Court, applied the rule and finally decided Powell's direct appeal. Powell then timely filed his habeas petition in February 1998. . . . The record indicates that Powell has not inappropriately delayed this case. The State is therefore not entitled to relief under NRS 34.800.

State v. Powell, 122 Nev. 751, 758–59, 138 P.3d 453, 458 (2006). Although the particulars of *Powell* differ from the present case, its underlying concerns apply with equal force here. The State's asserted prejudice is the same as it was in *Powell*: the passage of time from a sentencing, the difficulty of re-assembling the witnesses, and the deterioration of their memories. *See* MTD, at 15. And just as in *Powell*, these phenomena are not enough to trigger laches where they were not the fault of the petitioner, who acted as quickly as he could have. Mr. Howard began moving on his petition shortly after *Hurst I* allowed him to file it and he brought it in less than a year. The fact that almost twenty-nine years elapsed between remittitur on the direct appeal and a potential re-sentencing is not reasonably attributable to Mr. Howard. It was the Nevada Supreme Court that engaged in appellate reweighing in 2014. And it was the United States Supreme Court that declared such reweighing unconstitutional in 2016. The difficulties caused to the State by the amount of time that has passed are the same now as they would have been in 2014, and in the period before 2014 Mr. Howard could not—even by the State's account—have raised his *Hurst I* claim. It would be tremendously inequitable to deny Mr. Howard a re-sentencing despite a valid constitutional claim merely because the courts took so long in laying the foundation for his claim. As in *Powell*, judicial discretion here is best exercised in favor of turning aside the State's laches argument.

If the inquiry proceeds to the more specific terms of the laches statute, the State's theory still falls short.

The statute has two components. NRS 34.800(1)(a) authorizes dismissal where the delay "[p]rejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." For two straightforward reasons, this prong has no role to play here.

First, the State has not shown that a delay impaired in any respect its ability to oppose the petition. It offers nine words on this front: "the State is prejudiced in its ability to answer the Fifth Petition." MTD, at 15. That bare statement, with no elaboration or explanation, is woefully inadequate. A review of the State's motion to dismiss reveals that, contrary to its naked assertion otherwise, it has no difficulty responding to Mr. Howard's petition. Resolution of the petition turns on pure questions of law, primarily, whether *Hurst I* casts doubt on appellate reweighing and whether it is retroactive. Delay in the filing of the petition could not possibly have compromised the State's ability to address those legal matters. Quite to the contrary, it would have been impossible for the State to weigh in on the questions until *Hurst I* was decided in January 2016. Even the State is not bold enough to assert that it was prejudiced by the time that elapsed between January and October of this year. The only arguably factual issue that is implicated by this petition is whether the Nevada Supreme Court did engage in appellate reweighing in its 2014 opinion. That question can be answered in the affirmative without a moment's hesitation, as the court itself wrote that it had "weighed" the remaining aggravator "against the mitigating evidence presented to the jury." *Howard*, 2014 WL 3784121, at *6. To respond to the petition, the State had to do nothing more than basic legal research. It was just as capable of doing the research now as it was at any time in the past, if not more so.

Second, even if one takes as true the State's implausible and wholly unsupported view that it was prejudiced in responding to the petition, "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). Mr. Howard's petition is based on *Hurst I* and he took every step he could to get it timely filed after *Hurst I* was decided. *See* Ex. 4. Consequently, even if the State was somehow prejudiced in responding, the prejudice is outweighed by Mr. Howard's diligence.

The other element of the laches statute authorizes dismissal where the delay "[p]rejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b). This element is best disposed of

with reference to the *Powell* discussion above, *see supra* at 19–20, which shows that Nevada courts are not to utilize laches to bar a petition where the vast majority of the delay accrued through no fault of the petitioner's.

In overview, the State's laches defense widely misses the mark.

II. The Petition Is Meritorious

The State's procedural defenses have all been exposed as devoid of merit. Merits review is accordingly the only course to take. That review leads to the inescapable conclusion that the Nevada Supreme Court found facts that only a jury can find, and a resentencing is the only remedy for the violation.

Before determining whether *Hurst I* forbids the Nevada Supreme Court's appellate reweighing, it is necessary to determine whether Mr. Howard can benefit from that decision. That determination in turn breaks down into two separate queries: (1) whether *Hurst I* must be retroactive in order for Mr. Howard to rely on it; and (2) whether it is retroactive. With explanation to follow, the answers are that it needs to be retroactive and it is. After so proving, Mr. Howard will, finally, demonstrate his entitlement to relief under *Hurst I*.

A. *Hurst I* Announces A New Rule

As a matter of both state and federal law, the first question in a retroactivity inquiry is whether the relied-upon rule is new. If it is, the analysis proceeds to consider whether the rule is retroactive under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *See Colwell v. State*, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (describing both state and federal law). A rule is new where "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070 (emphasis omitted). That is plainly the case with Mr. Howard's appellate-reweighing challenge. As the State observes, appellate reweighing has been in wide use, including in the years between *Apprendi* and *Hurst*. *See* MTD, at 26 (citing twenty decisions using appellate reweighing during that period). It was only after *Hurst I* that courts began prohibiting judicial involvement in the selection process, and by extension in the reweighing process. *See supra* at 11–13 (discussing the decisions in which the supreme courts in Delaware, Florida, and Ohio applied that interpretation of *Hurst I*). At the

time the Nevada Supreme Court engaged in its appellate reweighing in Mr. Howard's case, the practice had not yet been frowned upon by the United States Supreme Court. In 2014, when the reweighing occurred, the Nevada Supreme Court was bound by its own caselaw to turn aside the claim alleged here. *See, e.g.*, *Leslie v. Warden*, 118 Nev. 773, 782–83, 59 P.3d 440, 447 (2002) (rejecting such a challenge). The court would not "have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution," *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 953 (1994). Ergo, the rule is a new one, and its retroactivity must be considered under *Teague*.

B. *Hurst I* Is Retroactive

Applying that test, *Hurst I*'s nullification of appellate reweighing is retroactive for purposes of federal and state law both.

1. *Hurst I* Is Retroactive Under Federal Law

Teague held that a new rule is retroactive if it falls into either one of two categories: (1) it is substantive, or (2) it is a "watershed rule[] of criminal procedure." 489 U.S. at 311, 109 S. Ct. at 1075–76 (internal quotation marks omitted). The proposition from *Hurst I* at issue here is a substantive one. If it is procedural, in the alternative, the rule is of watershed proportions.

a) The *Hurst I* Rule Is Substantive

Teague defined a substantive rule as one that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." 489 U.S. at 311, 109 S. Ct. at 1075 (internal quotation marks omitted). Later, the Court indicated that "the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). Under that traditional analysis, the *Hurst I* rule is substantive. A defendant for whom the jury has not weighed all of the valid aggravation against all of the mitigation is a defendant that cannot be executed. For that class of defendants, the Supreme Court has outlawed one punishment, and the rule is substantive as applied to them. *See*

Angela J. Rollins & Billy H. Nolas, *The Retroactivity of* Hurst v. Florida, *136 S. Ct. 616 (2016) to Death-Sentenced Prisoners on Collateral Review*, Southern Illinois University Law Journal, Forthcoming, available at https://perma.cc/CMP5-YWPA,[8] at 22[9] (hereinafter "Rollins") ("Under its substantive portion, *Hurst* prohibits the imposition of the death penalty on a class of individuals—those whose crimes do not fall within the narrow category of those for which death is an appropriate punishment.").

Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519 (2004), reinforces that reasoning. There, the Court's explanation for why *Ring* is not retroactive also indicates why *Hurst I* is:

> This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

Summerlin, 542 U.S. at 354, 124 S. Ct. at 2524 (emphasis removed). *Hurst I* made findings that relate to the weighing process "essential to the death penalty," rendering the rule substantive.

In addition to satisfying the conventional substantiveness test, the *Hurst I* rule also qualifies as substantive under the United States Supreme Court's newer, more liberal *Teague* approach. In 2016, the Supreme Court explicitly acknowledged that a rule can be substantive without literally "plac[ing] certain conduct, classes of persons, or punishments beyond the legislative power of Congress." *Welch v. United States*, --- U.S. ---, ---, 136 S. Ct. 1257, 1267 (2016). The *Welch* Court provided an example in the form of *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998), which found a rule retroactive even though the rule was later reversed by statute, thereby proving that the rule had not forbidden Congress from criminalizing a category of conduct. *See Welch*, --- U.S. at ---, 136 S. Ct. at 1267.

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[8] The website perma.cc allows the user to freeze a website for perpetuity in its present version with a constant address. Wherever possible, Mr. Howard has employed the service here to guarantee that the cited websites are not altered or destroyed during the litigation.

[9] Because the cited article has not yet been published, it is available in its entirety only to those with subscriptions to the Social Science Research Network, a website that posts forthcoming academic pieces. For the convenience of the Court and opposing counsel, Mr. Howard has attached the article as Exhibit 2, and will henceforth cite to it in the form, "Rollins, *supra*, at --."

The newer cases delineate as substantive rules not just as those that prohibit the legislature from punishing certain conduct, but also those that "narrow the scope of a criminal statute by interpreting its terms." *Welch*, --- U.S. at ---, 136 S. Ct. at 1265. That is precisely what happened here. *Hurst I* limited the effect of Florida's capital statute, expressly restricting its provisions on advisory jury death sentences, *see* 577 U.S. at ---, 136 S. Ct. at 622, and impliedly restricting its provisions on juror unanimity and burden of proof, *see Hurst II*, 202 So. 3d at 44; *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."). In so doing, *Hurst I* "narrow[ed] the scope of a criminal statute by interpreting its terms," *Welch*, --- U.S. at ---, 136 S. Ct. at 1265, and it is accordingly substantive.

Aside from its general language, the facts of *Welch* are edifying. That decision found retroactive the Supreme Court's invalidation of the residual clause in the Armed Career Criminal Act, which imposed harsher sentences on defendants previously convicted of violent felonies. *See generally Welch*, --- U.S. at ---, 136 S. Ct. 1257. Importantly, the decision that *Welch* rendered retroactive was based in large measure on the Supreme Court's conclusion that a particular type of judicial fact-finding violated due process principles. *See Johnson v. United States*, 566 U.S. ---, ---, 135 S. Ct. 2551, 2556–62 (2015). In particular, the residual clause was condemned as unconstitutionally vague in *Johnson* because it was analyzed by courts according "to a framework known as the categorical approach," which "assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Id.* at ---, 135 S. Ct. at 2557 (internal quotation marks omitted). The categorical approach "thus requires a court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* It was not just the language of the statute that made the residual clause vague—it was the language of the statute in conjunction with the categorical approach. *See id.* (observing that the provision was vague because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements"). In fact, the dissent expressly lobbied for

an abandonment of the categorical approach so as to salvage the residual clause, and the majority refused to do so. *See id.* at ---, 135 S. Ct. at 2561–62.

As a matter of retroactivity law, there is little that separates judicial reweighing at a capital state sentencing from the categorical approach at a federal non-capital sentencing. Both are common law doctrines, crafted by the Supreme Court, that guide judges in how to conduct certain types of sentencing inquiries. Both were declared unconstitutional in certain situations. With *Johnson*, the categorical approach was declared unconstitutional in residual clause cases. With *Hurst I*, judicial weighing of aggravation against mitigation was declared unconstitutional in capital cases. As similar as they are, the retroactivity inquiry must be answered identically for both of them. *Johnson* has already been declared retroactive, and *Hurst I* has been declared retroactive in Florida and Delaware. *See Mosley v. State*, --- So. 3d ----, 2016 WL 7406506 (Fla. 2016); *Powell*, 153 A.3d 69. This Court should declare *Hurst I* retroactive as well.

The *Welch* case also shows that a rule is not disqualified from substantive status simply because a defendant can get the benefit of the rule and then be resentenced to the same punishment. Under *Welch*, a defendant can have his sentence vacated and he can then be given the same enhancement, so long as it is not done on the basis of the now-defunct residual clause. *See, e.g.*, *United States v. Gieswein*, No. 5:07-cr-120, Dkt. 211, 237 (W.D. Okla. July 25, 2016) (granting retroactive *Johnson* relief and vacating the defendant's sentence but then resentencing him to the same term of imprisonment as he had before). Under *Hurst I*, a defendant can have his death sentence vacated due to judicial weighing and he can then be resentenced to death by a jury. In both instances, the rule is still substantive for retroactivity purposes.

A similar example of the Court drifting from *Teague*'s definition of a substantive rule is present in the juvenile-sentencing context. In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), the Supreme Court held that *mandatory* life-without-parole ("LWOP") punishments for minors were unconstitutional. *Miller* expressly cautioned that it was *not* handing down "a categorical bar on [LWOP] for juveniles." *Id.* at ---, 132 S. Ct. at 2469. It was only requiring sentencing judges to take into consideration certain mitigating features associated with youth. *See id.* at ---, 132 S. Ct. at 2467 (critiquing the schemes under review because they "preclude a

sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it"). *Miller* thus quite consciously refrained from protecting an entire class of conduct, going out of its way to clarify that it was not "foreclos[ing] a sentencer's ability to" impose on a juvenile a punishment of LWOP, assuming the sentencer ran through the appropriate factors before doing so. *Id.* In no intuitive sense, then, did *Miller* either decriminalize any category of primary conduct, *see Teague*, 489 U.S. at 311, 109 S. Ct. at 1075, or take off the table a type of punishment for a class of defendants based on their status, *see Penry*, 492 U.S. at 330, 109 S. Ct. at 2953. Far from it: in the wake of *Miller*, murder was still a crime, obviously, and a juvenile defendant could still be sentenced to LWOP for it.

Nonetheless, *Miller* was held to be retroactive. In so holding, the Supreme Court acknowledged that "*Miller*'s holding has a procedural component." *Montgomery v. Louisiana*, --- U.S. ---, ---, 136 S. Ct. 718, 734 (2016). Even so, "a procedural requirement necessary to implement a substantive guarantee" is, the Court concluded, no less substantive. *Id.* That is a perfect description of *Hurst I*. Its repudiation of judicial weighing in capital sentencings is a procedural requirement—a change to the mechanics of death penalty trials and appeals—that is necessary to implement the substantive guarantee that every fact exposing a defendant to a death sentence be proven to a jury beyond a reasonable doubt.

Montgomery's take on the other way in which a rule can be substantive—by exempting from punishment a class of defendants—is also telling. By *Montgomery*'s account, the class of defendants at issue in the juvenile LWOP cases are "juvenile offenders whose crimes reflect the transient immaturity of youth." --- U.S. at ---, 136 S. Ct. at 734. The presence of this class made the rule substantive, even though the remedy was only that "an affected prisoner receives a procedure through which he can show that he belongs to the protected class." *Id.* at ---, 136 S. Ct. at 735. Precisely so with *Hurst I* and its denunciation of appellate reweighing. The definition of the class need not be immutable. In *Montgomery*, it is those juvenile murderers who are redeemable, and in *Hurst I* it is those adult murderers who have had aggravators invalidated on appeal and who did not get resentencings. In either category, it is *some* juveniles and *some* adults. And the relief is not the automatic award of a lesser sentence. In *Montgomery*,

it is a resentencing with the judge to consider all of the relevant facts, and in *Hurst I* it is a resentencing before a jury.

Under the Supreme Court's most recent interpretation of retroactivity law, then, *Hurst I*'s rule is substantive in both senses: as a "procedural requirement necessary to implement a substantive guarantee" and as the protection of a class from a certain type of punishment, i.e., a punishment by a judge.

More to the point, in *Montgomery*, the Supreme Court is looking at retroactivity questions through a more flexible, contextualist lens. *See* Rollins, *supra*, at 34–36. The contextualist perspective here would consider the irrevocability of death, the need for greater reliability in capital proceedings, the core role the jury plays in the selection process, and the fairly minor ramifications of a retroactivity finding. With the exception of the final item, these factors have all been surveyed above, and all of them call for retroactivity. The final factor does too. A finding of retroactivity would not have a substantially detrimental impact on the administration of justice. The class of prisoners who might benefit from such a ruling is limited. It would apply to death row inmates alone, for one thing, and currently there are only eighty people on death row in Nevada. *See* http://www.deathpenaltyinfo.org/state_by_state. Even of those eighty, a number would have no claim to relief, for many defendants have their challenges to aggravators rejected. *See, e.g.*, *Calambro v. State*, 114 Nev. 106, 109–13, 952 P.2d 946, 948–50 (1998); *Greene v. State*, 113 Nev. 157, 171–74, 931 P.2d 54, 63–64 (1997). Because no aggravators were struck in cases like that, no appellate reweighing took place. The many death-sentenced prisoners in that category cannot raise the challenge brought here. Recognizing the retroactivity of *Hurst I* would consequently not cause an undue disruption to Nevada's legal system.

In fact, it would be a far lesser disruption than the United States Supreme Court generated through its retroactivity determination in *Montgomery*, which casts doubt on more than 2,000 cases across the country. *See* John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, The Phillips Black Project, *available at* https://perma.cc/P9Qs-5S2X. And against whatever modest disruption might be occasioned

by a decision rendering *Hurst I* retroactive in Nevada, one must balance the compelling need for defendants to be treated uniformly and in accordance with their constitutional rights. *See Mosley*, --- So. 3d at ----, 2016 WL 7406506, at *24 ("[W]here the rule announced is of such fundamental importance, the interests of fairness and curing individual injustice compel retroactive application of *Hurst* despite the impact it will have on the administration of justice." (internal quotation marks omitted)); *see also Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) ("Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." (internal quotation marks omitted)). That interest decisively outweighs any other, and dictates a determination of retroactivity.

b) *Hurst I* Announced A Watershed Rule

If not substantive, new rules are retroactive so long as they constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311, 109 S. Ct. at 1076. Watershed rules are those that "implicate the fundamental fairness of the trial" and "significantly improve . . . pre-existing fact-finding procedures." *Id.* at 312, 109 S. Ct. at 1076. *Hurst I* spells out such a rule.

As a preliminary matter, it is important to fix the analysis on the proper area of law. The State focuses on the United States Supreme Court's determination that *Ring* is not retroactive, *see* MTD, at 23, but that determination does not resolve the question presented here. Although *Ring* is the case that first prohibited judicial encroachment into capital decision-making, it differs from *Hurst I* in a key respect. Namely, *Ring* did not deal with the requirement that all elements of a crime be proven beyond a reasonable doubt. Rather, it involved only the Sixth Amendment right to a jury, not the burden of proof. That is, *Ring* concerned *who* had to find the aggravators, not *how* they were to be found. Indeed, when it found *Ring* non-retroactive, the Supreme Court commented on that very aspect of the case. *See Summerlin*, 542 U.S. at 351 n.1, 124 S. Ct. at 2522 n.1 (2004) ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue" in *Ring*. (citation omitted)); *see also Ring*, 536 U.S. at 597, 122 S. Ct. at 2437 (observing that Arizona used the reasonable-doubt standard at the eligibility phase).

Hurst I, on the other hand, goes directly to the burden-of-proof question. *See Powell*, 153 A.3d at --, 2016 WL 7243546, at *3 (deciding *Hurst I*, unlike *Ring*, announced a watershed rule because *Ring* only addressed "the misallocation of fact-finding responsibility" and *Hurst I*, on the other hand, addressed the burden of proof). Under the Florida statute struck down by *Hurst I*, a judge could override a jury's recommendation for a life sentence "if the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ." *Hurst I*, 136 S. Ct. at 625 (Alito, J., dissenting) (internal quotation marks omitted). When it voided the statute, therefore, the Supreme Court was applying its caselaw on the Sixth Amendment directive that every element of a charged crime be proven beyond a reasonable doubt. *See Rauf*, 145 A.3d at 433, 437 (invalidating a Delaware statute that allowed a jury to weigh aggravation against mitigation under a preponderance standard, because—under *Hurst I*—a reasonable-doubt standard is constitutionally required); *see also Powell*, 153 A.3d at --, 2016 WL 7243546, at *4–5 (holding that *Hurst I*'s change in the burden of proof applies retroactively as a watershed ruling).

Unlike with new jury-right rules, new reasonable-doubt rules are retroactive. The United States Supreme Court made that clear in *Ivan V. v. City of New York*, 407 U.S. 203, 92 S. Ct. 1951 (1972) (per curiam), where it deemed retroactive its then-recent holding that juvenile crimes must be proven beyond a reasonable doubt. Its rationale was that "the major purpose of the constitutional standard of proof beyond a reasonable doubt" is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Id.* at 205, 92 S. Ct. at 1952; *see also id.* at 204–05, 92 S. Ct. at 1952 ("[T]he reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.").

True, *Ivan V.* predates *Teague*, and that case altered the Supreme Court's retroactivity framework. *See Teague*, 489 U.S. at 301, 109 S. Ct. at 1070 (describing *Teague* as working a "modification" on the Court's historical approach to retroactivity). But the language from *Ivan V.* still tracks closely with *Teague*'s characterization of a watershed rule. *Compare Ivan V.*, 407

U.S. at 205, 92 S. Ct. at 1952 ("Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."), *with Teague*, 489 U.S. at 312–13, 109 S. Ct. at 1076 (approving Justice Harlan's definition of watershed, which included "all new constitutional rules which significantly improve the pre-existing fact-finding procedures"); *see also Powell*, 153 A.3d at --, 2016 WL 7243546, at *5 ("*Teague* incorporated the 'fundamental fairness' language from *Ivan V.* into its watershed procedural rule exception to non-retroactivity." (quotation marks in original)). Of equal importance, the Court has indicated post-*Teague* that its earlier retroactivity caselaw remains "germane," and it has said so about the watershed exception in particular. *See Summerlin*, 542 U.S. at 357, 124 S. Ct. at 2525. *Ivan V.* therefore remains good law.

Implementing that law here, *Hurst I* compels the government to prove beyond a reasonable doubt that the aggravation outweighs the mitigation. As such, it is a reasonable-doubt case, like *Ivan V.*, and retroactive for the same reasons canvassed in that decision. *See also Hankerson v. North Carolina*, 432 U.S. 233, 242–44, 97 S. Ct. 2339, 2344–45 (1977) (applying *Ivan V.* to find another reasonable-doubt rule retroactive). "Further, the case for retroactively applying *Hurst*'s proof-beyond-a-reasonable-doubt component is even stronger than the rules of *Ivan V.* and *Hankerson* because the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" *See* Rollins, *supra*, at 25 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954 (1978)).

The Delaware Supreme Court and a federal district court in Florida have expressed approval of the foregoing argument and ruled *Hurst I* retroactive. In Delaware, the court held *Hurst I* was retroactive because it announced a watershed procedural ruling that changed the burden of proof. *See Powell*, 153 A.3d 69, 74 (Del. 2016). In the Florida federal case, a death row inmate was seeking a stay so he could exhaust a *Hurst I* claim, and the State opposed the stay on the ground that "any *Hurst* claim is futile, because *Hurst* is not retroactive." *Guardado v. Jones*, No. 4:14-cv-256, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016). The court

disagreed, regarding the claim as "not futile" because *Ring* was declared non-retroactive in a case that "did not address the requirement for proof beyond a reasonable doubt" and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive." *Id.* These courts have recognized the distinction between a jury-trial case like *Ring*, which is non-retroactive under *Summerlin*, and a reasonable-doubt case like *Hurst I*, which is retroactive under *Ivan V.* This Court should follow the same sound approach, and declare *Hurst I* retroactive.

The failure to apply the beyond-a-reasonable-doubt standard infected the Nevada Supreme Court's appellate reweighing in this case. In its perfunctory appellate-reweighing discussion, the Nevada Supreme Court did not refer to any standard whatsoever. It simply stated its conclusion "that the jury would have found Howard death eligible and imposed death," even without the defective aggravator. *Howard*, 2014 WL 3784121, at *6. Regardless, in light of Nevada law, it is undeniable that the reasonable-doubt test was not used. The Nevada Supreme Court has long held that when a jury weighs aggravating against mitigation at the selection phase, it does not do so according to a reasonable-doubt standard. *See Nunnery v. State*, 127 Nev. 749, 770–76, 263 P.3d 235, 250–53 (2011) (upholding the refusal to issue a reasonable-doubt instruction at the selection stage, and rejecting the proposition that "the weighing of aggravating and mitigating circumstances is subject to the beyond-a-reasonable-doubt standard"); *accord DePasquale v. State*, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990).

Appellate reweighing, in Nevada, consists of the state supreme court putting itself in the shoes of the jury. A good illustration comes from *Bridges v. State*, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000), where the court went through its reweighing calculus in some detail, while citing the statutes that govern a jury's decision-making process, and while offering no particular standard of law. Because Nevada juries do not operate under the reasonable-doubt standard at the selection stage, and because the Nevada Supreme Court takes the place of the jury when it reweighs on appeal, appellate reweighing is not performed to a reasonable doubt. It follows that when the Nevada Supreme Court conducted its appellate reweighing in Mr. Howard's case, it did not do so under the reasonable doubt standard. The reasonable-doubt holding of *Hurst I* is the

precise reason that it is retroactive, and since Mr. Howard's appellate reweighing violated that aspect of *Hurst I*, he is entitled to its retroactive benefit.

Another reason why *Ring*'s non-retroactivity does not settle *Hurst I*'s retroactivity, aside from the reasonable-doubt issue examined above, is simply that of increased experience and wisdom. *Teague* embraced Justice Harlan's philosophy that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process," can expand our sense of what makes for a watershed rule, by teaching us what "bedrock procedural elements . . . must be found to vitiate the fairness of a particular conviction." 489 U.S. at 311, 109 S. Ct. at 1076. At one point, it was not appreciated that protecting a jury's right to decide the most serious issue a jury ever decides—that of life and death—was so central to our criminal justice system. *See generally Summerlin*, 542 U.S. 348, 124 S. Ct. 2519. By now, it is. *See Asay v. State*, --- So. 3d ----, 2016 WL 7406538, at *9 (Fla. 2016) ("The underpinnings of [*Hurst I*], requiring that the jury make all the factual findings necessary to impose a death sentence, are based on the critical right to a jury trial . . . . The right to a jury trial not only ensures a defendant's guilt is accurately determined, but also that any decision on the matters is made by a group of the defendant's peers—as opposed to a member of the government."); *Rauf*, 145 A.3d at 436 (Strine, C.J., concurring) ("To me, *Hurst* and its predecessors surface a reality that had been somewhat obscured in the development of the law in the decades since [1972], which is that the Sixth Amendment right to a jury is most important and fundamental when the issue is whether a defendant should live or die.").

For all of these reasons, if *Hurst I* is considered to be a new procedural rule, it must be considered a watershed development, and thus retroactive as a matter of federal law.[10]

2. *Hurst I* Is Retroactive Under State Law

Nevada follows the same framework as the federal courts do for evaluating the retroactivity of new precedents, while preserving their right to make a case retroactive despite the federal courts' refusal to do so. *See Colwell*, 118 Nev. at 819, 59 P.3d at 471. In this case,

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[10] Although the U.S. Supreme Court has not yet opined on *Hurst I*'s retroactivity, its summary remands of several Alabama cases for further *Hurst I* proceedings intimates that it will eventually find the rule retroactive. *See* Rollins, *supra*, at 33.

the reasons set forth earlier in the federal retroactivity section are the same reasons why this Court should find *Hurst I* retroactive under state law.

One specific component of the state-retroactivity inquiry merits further examination. Above, Mr. Howard explored how the United States Supreme Court has in recent cases departed from a mechanical application of *Teague*. *See supra* at 28. When considering whether a rule is substantive, the Court no longer asks only whether the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075, or whether it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330, 109 S. Ct. at 2953. Now, the Court also queries whether the rule "narrow[s] the scope of a criminal statute by interpreting its terms." *Welch*, --- U.S at ---, 136 S. Ct. at 1265, and whether it provides "a procedural requirement necessary to implement a substantive guarantee," *Montgomery*, --- U.S. at ---, 136 S. Ct. at 734, all while using a more adaptable, context-sensitive approach, *see supra* at 28. In the federal-law section, Mr. Howard demonstrated that under the newer framework, the *Hurst I* rule is substantive. *See supra* at 23–29. Still, Mr. Howard recognizes that this Court might be hesitant to declare, as a matter of federal law, that the most exacting version of the *Teague* doctrine is extinct, since the United States Supreme Court has not yet expressly said so.

Whatever federal law might be, this Court is free as a matter of state law to apply the principles from the United States Supreme Court's more recent, post-*Teague* cases.[11] *See Colwell*, 118 Nev. at 819, 59 P.3d at 471 ("[A]s a state court we choose not to bind quite so severely our own discretion in deciding retroactivity" as does the United States Supreme Court). The Court should exercise that freedom. The rationale of the later cases is eminently sensible. As *Montgomery* rightly held, a "procedural requirement necessary to implement a substantive

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[11] Mr. Howard takes the position that *Ring* should be applied retroactively both as a matter of state and federal law, under the more lenient *Montgomery* test of retroactivity outlined above. However, Mr. Howard recognizes that this Court is constrained by binding precedent to hold otherwise. *See Summerlin*, 542 U.S. at 351–58, 124 S. Ct. at 2522–26 (finding *Ring* non-retroactive under federal law); *Colwell*, 118 Nev. at 820–22, 59 P.3d at 472–73 (doing the same under state law). Mr. Howard raises the argument to preserve it for appeal.

guarantee" is just as deserving of retroactivity as a more straightforward substantive guarantee. --- U.S. at ---, 136 S. Ct. at 734. Both are essential to the same outcome: the elimination of punishments that were imposed unconstitutionally. More generally, the flexible new analysis permits courts to tailor their holdings more conscientiously to the circumstances at hand, and to balance the government's interest in finality against society's interest in uniformity, fairness, and justice. That balance is best struck here with a finding of retroactivity. To achieve the better outcome, this Court can and should invoke state law. *See Falcon*, 162 So. 3d at 960 ("Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." (internal quotation marks omitted)).

One decision that underscores the equitable point is *Kirkland*, the case in which the Ohio Supreme Court recognized that *Hurst I* abolishes appellate reweighing. *See supra* at 12–13. In *Kirkland*, the State opposed the resentencing in a motion for reconsideration. It observed there that Mr. Kirkland's direct appeal had already terminated by the time of the remand, thereby triggering retroactivity as "a threshold issue." *See* Ex. 3, at 5; *see also Kirkland v. Ohio*, --- U.S. ---, 135 S. Ct. 1735 (2015) (denying certiorari on the direct appeal); *Beard v. Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 2510 (2004) ("State convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."). The State also vigorously questioned the retroactivity of *Hurst I*, attacking it as both non-substantive and non-watershed. *See* Ex. 3, at 5–6. The State's arguments were to no avail; the Ohio Supreme Court denied its motion for reconsideration and adhered to its prior remand order. *See State v. Kirkland*, 147 Ohio St. 3d 1440, 63 N.E.3d 158 (2016) (table).

It is unknown why the Ohio Supreme Court apparently gave retroactive effect to *Hurst I* and its invalidation of appellate reweighing. As previously discussed, it could have done so for any number of valid reasons, based on either state or federal law. What we do know, however, is that the Ohio Supreme Court considered it necessary to issue a remand for resentencing with a

seemingly final conviction, because appellate reweighing now violates a bedrock constitutional right and a jury sentencing is the only way to correct the violation. The same is true here.

C. Mr. Howard Is Entitled To A Resentencing

Having resolved that Mr. Howard's *Hurst I* claim is reviewable on the merits and based on a retroactive rule, the only thing that remains is to apply the law to his claim. Most of the reasons for why *Hurst I* invalidates Mr. Howard's death sentence have already been outlined, and will not be belabored by repetition. In particular, Mr. Howard refers the Court back to the earlier explanation of why he has good cause to file his petition now because it is based on *Hurst I*, and not *Ring*. *See supra* at 7–14. That section explains how *Hurst I* outlaws any judicial role in the capital weighing, or selection, process, and relies upon well-reasoned decisions from the Delaware, Florida, and Ohio Supreme Courts. *See id.* The analysis there is sufficient to show that the Nevada Supreme Court's reweighing of aggravation and mitigation in Mr. Howard's case was unconstitutional.

In this section, Mr. Howard will only add a few additional points in response to the State's unconvincing comments on the merits. Because he has invoked both the federal and the state constitutions, he will separately address those two sources of law.

1. Federal Law Entitles Mr. Howard To A Resentencing

Turning to federal law, the State vainly insists that appellate reweighing remains valid under the United States Supreme Court's cases. But the State's principal authority for the continuing vitality of appellate reweighing—*Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990)— is a very weak foundation indeed. Although *Clemons* approved of appellate reweighing in 1990, the State concedes—as it must—that the case's jurisprudential foundation has eroded substantially. Specifically, the State grants that *Hurst I* expressly overruled two of the opinions undergirding *Clemons*' holding: *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). *See* MTD, at 27. Resolutely ignoring the writing on the wall, however, the State takes the position that *Hurst I* only overruled these cases to the extent that they allowed judicial findings on eligibility, while leaving judicial findings on selection untouched. *See id.* at 27–28. Unsurprisingly, the State

does not mention the specific language used by the Supreme Court to abrogate *Hildwin* and *Spaziano*, as that language reflects a far broader shift in the law: "*Spaziano* and *Hildwin* summarized earlier precedent to conclude that the Sixth Amendment does not require that *the specific findings authorizing the imposition of the sentence of death* be made by the jury. Their conclusion was wrong, and irreconcilable with *Apprendi*." *Hurst I*, 577 U.S. at ---, 136 S. Ct. at 623 (emphasis added) (internal quotation marks omitted) (citation omitted). The specific findings authorizing a death sentence manifestly include the decision that the aggravation outweighs the mitigation and a death sentence is therefore appropriate. In a nutshell, a death sentence cannot be imposed until a decision-maker completes that weighing determination. *See* 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."). The weighing determination is the most classic type of finding authorizing a death sentence that one could conceive of. By the plain language of *Hurst I*, then, the precedent that previously blessed appellate reweighing has been discarded. *See* Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'P'Orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. Miami L. Rev. 1118, 1148–52 (2016) (arguing that appellate reweighing is unconstitutional under *Hurst I*).

Finally, a word must be said about harmless error and prejudice. In his petition, Mr. Howard asserted that the appellate-reweighing error was structural, and therefore the Court should presume prejudice rather than conduct a harmless-error analysis. *See* Pet. at 7. Alternatively, Mr. Howard argued that if harmless error applied, the violation prejudiced him. *See id.* at 7–8. The State did not respond to either point in its motion to dismiss. Through its silence, the State waives any defense on harmless error or prejudice. *See Polk v. State*, 126 Nev. 180, 183–86 & n.2, 233 P.3d 357, 359–60 & n.2 (2010) (holding that the State waived its opposition to a constitutional claim, including a harmless-error argument, and noting that "the State bears the burden of proving that the error was harmless"); *Flanagan v. State*, 112 Nev. 1409, 1418–21, 930 P.2d 691, 697–98 (1996) ("The harmless-error rule places the burden on the

State to demonstrate beyond a reasonable doubt that any error was harmless, i.e., that it did not contribute to the verdict."). Thus, if this Court finds that the appellate reweighing violated Mr. Howard's constitutional rights, it must vacate the death sentence and order a new penalty phase without any inquiry into prejudice or harmlessness.

Should the Court disagree and proceed further, the same result obtains. For starters, the error is simply not subject to harmless-error analysis. The constitutional violation that took place here was that a jury did not weigh the mitigation against Mr. Howard's sole remaining aggravator. A harmlessness inquiry asks "whether the *same*" sentence "would have been rendered absent the constitutional error." *Sullivan v. Louisiana*, 508 U.S. 275, 280, 113 S. Ct. 2078, 2082 (1993) (emphasis in original). That question "is utterly meaningless" when, as here, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* Then, "there is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* (emphasis in original). No jury has ever undertaken the weighing that Mr. Howard has a right to under the Sixth Amendment. The harmless-error test therefore has no place, and a resentencing is the only lawful option.

The error is not susceptible to a harmless-error inquiry for another reason as well: it is structural. Errors are structural when they constitute "defects in the constitution of the trial mechanism." *Brecht v. Abrahamson*, 507 U.S. 619, 629–30, 113 S. Ct. 1710, 1717 (1993). Such errors are those that "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and [without which] no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8–9, 119 S. Ct. 1827, 1833 (1999) (alteration in original) (internal quotation marks omitted). Appellate reweighing is such an error.

The right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 2538–39 (2004). The division between judicial findings and jury findings are consequently essential to our constitutional system: "Without that restriction, the jury would not exercise the control that the Framers intended." *Id.* at 306, 124 S. Ct. at 2539. It is an especially

important line in capital cases, where an individual's life hangs in the balance. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 2931–32 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."). Moreover, the jury's role in the capital selection process makes it far more likely that death sentences will be imposed when appropriate and avoided when inappropriate. *See, e.g.*, *Summerlin*, 542 U.S. at 360, 124 S. Ct. at 2527 (Breyer, J., dissenting) (commenting that "the right to have jury sentencing in the capital context is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an assessment of whether death is the appropriate punishment"); *Gregg*, 428 U.S. at 181, 96 S. Ct. at 2929 ("The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system'" (citation omitted)); Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60–69 (1980) ("The jury is substantially more likely than the judge to reflect community feelings on the need for a retributive response to the offender and the offense."). Judicial elections, which are used to fill Nevada Supreme Court seats, only exacerbate the problems. *See, e.g.*, Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override*, 16 (July 2011), available at https://perma.cc/EW6W-F3V5 ("[R]ecent studies show that elections exert significant direct influence on decision-making in death penalty cases."); *accord* Kate Berry, Brennan Center For Justice, *How Judicial Elections Impact Criminal Cases* (Dec. 2, 2015), available at https://perma.cc/8VYT-7Y6F. In view of these authorities, there is no doubt that the jury right invoked here is one "without which a criminal trial cannot reliably serve its function," *Neder*, 527 U.S. at 8–9, 119 S. Ct. at 1833, and prejudice must be presumed.

In the event the Court conducts a harmless-error inquiry, the violation was incontrovertibly prejudicial. Such an inquiry asks whether "the State could show beyond a reasonable doubt that the error complained of did not contribute to the" result. *Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006). For reasons already established, there is no chance the State could make that showing in Mr. Howard's case. *See supra* at 14–18.

2. State Law Entitles Mr. Howard To A Resentencing

Article 1, Section 3 of the Nevada Constitution provides, in pertinent part, that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." The parallel provision of the U.S. Constitution guarantees, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *See* U.S. Const. amend. VI. Because the two provisions both protect the right to a jury trial, a defendant's protection under Article 1, Section 3 must be at least as broad as that of the Sixth Amendment. *See Mills v. Rogers*, 457 U.S. 291, 300, 102 S. Ct. 2442, 2448–49 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum."). Therefore, the foregoing discussion applies with identical force to the state constitution, and Mr. Howard is entitled to a resentencing under that constitution.

Furthermore, it is black-letter law that "a state court is entirely free to read its own State's constitution more broadly than [the United States Supreme Court] reads the Federal Constitution." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S. Ct. 1070, 1077 (1982); *accord Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219 (1975). Applying that maxim here, should this Court conclude that Mr. Howard's claim fails as a matter of federal law, it ought to still grant relief as a matter of state law.

The Florida Supreme Court's decision in *Hurst I* provides helpful guidance on the state constitutional question. Almost identical to Nevada's cognate provision, the Florida Constitution states: "The right of trial by jury shall be secure to all and remain inviolate." Fla. Const. Art. 1, § 22. On their faces, the jury-trial rights in the Nevada and Florida Constitutions are more capacious than the Sixth Amendment right, which includes no "inviolate" language. *See City of Pasco v. Mace*, 98 Wash. 2d 87, 99, 653 P.2d 618, 624 (1982) (en banc) ("It is evident, therefore, that the right to trial by jury which was kept 'inviolate' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.").

In considering this broad language, the Florida Supreme Court in *Hurst II* ascertained that it protected a right for a capital defendant to have a jury "unanimously find that the aggravating

factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Hurst II*, 202 So. 3d at 54. The Florida high court then explained the rationale for its determination:

> This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the final decision in the weighing process must be supported by sufficient competent evidence in the record.

Id. (internal quotation marks omitted). Everything that brought the Florida Supreme Court to this conclusion holds true in Nevada. Like Florida, Nevada has the more expansive language in its state constitutional jury-trial provision. Like Florida, Nevada requires that a death sentence be based on permissible evidence. *See Howard v. State*, 102 Nev. 572, 579, 729 P.2d 1341, 1345 (1986) ("Our review of the record in this case leads us to conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. We further conclude that Howard's sentence of death is neither excessive nor disproportionate to the crime of defendant."); *see also Calambro*, 114 Nev. at 114, 952 P.2d at 951 (indicating that the Nevada Supreme Court's proportionality review includes a determination as to whether the decision-maker below erred "in balancing the aggravating circumstances with the mitigating evidence and in finding that the former outweighed the latter"). And like Florida, Nevada has historically insisted upon unanimous jury verdicts to convict defendants of criminal charges. *See State v. McClear*, 11 Nev. 39, 60, 1876 WL 4526, *13 (1876) ("The terms 'jury' and 'trial by jury,' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men . . . who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them.").

With all of the same conditions present in Nevada as in Florida, the same conclusion is appropriate too: there is a state constitutional right to a jury determination on the weighing of

aggravation against mitigation. The Nevada Supreme Court usurped that jury role here, and Article 1, Section 3 compels vacatur of the sentence as a result.

Aside from this highly persuasive authority from Florida, simple common sense militates in favor of the same holding. In his *Rauf* concurrence, Chief Justice Strine of the Delaware Supreme Court eloquently explained why it is irrational to draw a line between eligibility and selection for purposes of the right to a jury trial:

> At the beginning of our Republic and throughout most of its history, defendants did not go to the gallows unless juries said they should. And the role of the jury was seen as especially important when a defendant's life was in the balance, because it made sure that a defendant would suffer the ultimate punishment only if twelve members of the community deliberated together and unanimously concluded that [it] should be so. To me, *Hurst* and its predecessors surface a reality that had been somewhat obscured in the development of the law in the decades since [1972], which is that the Sixth Amendment right to a jury is most important and fundamental when the issue is whether a defendant should live or die. As the U.S. Supreme Court has long recognized, death is different. The proposition that any defendant should go to his death without a jury of his peers deciding that should happen would have been alien to the Founders, and starkly out of keeping with predominant American practices as of the time of *Furman* itself. The cost of useful precedent mandating that each defendant who commits a capital offense must also be accorded a rational sentencing proceeding that must include a careful consideration of those factors weighing in favor of mercy does not have to include depriving the defendant of the fundamental protection of a jury having to make the final judgment about his fate. If the right to a jury means anything, it means the right to have a jury drawn from the community and acting as a proxy for its diverse views and mores, rather than one judge, make the awful decision whether the defendant should live or die.

Rauf, 145 A.3d at 436. Chief Justice Strine's concurrence, endorsed by a majority of the Delaware Supreme Court, gives voice to the simple truth that there is no principled, constitutional distinction between eligibility and selection for purposes of the jury-trial right. Both are necessary to send a defendant to death row, and both should therefore be decided by the jury. Even if *Hurst I* did not adopt that reasoning, it remains a reality, and it can and should be approved of by the Nevada courts as a matter of state law.[12]

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[12] If the Nevada courts accept Mr. Howard's state constitutional theory, any procedural bars would be overcome for the same reasons sketched out above with reference to his federal constitutional theory.

III. Conclusion

"[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444, 1451 (1968). *Hurst I* makes clear the basic principle that "the common-sense judgment of a jury," *id.*, is never more essential than when a jury is engaged in its gravest responsibility: determining whether a defendant will live or die. In violation of that principle, the Nevada Supreme Court invaded the province of the jury and weighed for itself whether Mr. Howard deserved a death sentence. For that reason, and because the State's procedural objections to the petition are baseless, the motion to dismiss must be denied, and Mr. Howard's death sentence must be vacated.

DATED this 27th day of March 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of this Reply in Support of Petition and Response to Motion to Dismiss was made this 27th day of March 2017, by Electronic Filing and by email to:

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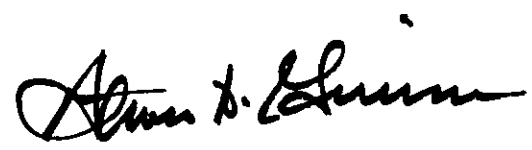

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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 81C053867 DEPT NO: XVII

REPLY TO OPPOSITION TO MOTION TO DISMISS FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: April 19, 2017
TIME OF HEARING: 3:00 a.m.

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits this Reply to Opposition to Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Court summarized the facts of this case in the Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth demand for habeas relief:

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.
>
> Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.
>
> Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.
>
> Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.
>
> Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.
>
> Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a

uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by

Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of

the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[1]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[2] Howard also stated he was on veteran's disability in New York.[3] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

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[1] This evidence was admitted to show identity and motive for the Monahan murder.

[2] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[3] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 12-19 (footnotes in original)).

STATEMENT OF THE CASE

This Court also set forth the vast majority of the procedural history of this case in the 2010 Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth habeas petition:

> On May 20, 1981 defendant Samuel Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
>
> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
>
> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
>
> Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.
>
> Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.
>
> A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.
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> At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.
>
> On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a

continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felongy - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion

to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those

records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[5]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[6]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could

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[4]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[5] Collier was decided two years after Howard's trial.

[6] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to

challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and

second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[7]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 1-12 (footnotes in original)).

This Court denied Petitioner's fourth habeas petition. (Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 26-33). Petitioner challenged this Court's decision before the Nevada Supreme Court. (Notice of Appeal, filed on December 21, 2010). Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, __ Nev. __, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at __, 291 P.3d at 139. A cover sheet indicated that the motion was

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[7] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

[8] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010._____.

sealed but the FPD failed to file a separate motion to seal the pleading. Id. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at __, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. (Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 2908 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 5, 2016). Respondent filed an opposition and motion to dismiss on November 2, 2016. (Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction) (Opposition and Motion to Dismiss), filed November 2, 2016).

On December 1, 2016, Petitioner filed an amended fifth state habeas petition. (Amended Petition for Writ of Habeas Corpus (Post-Conviction) (Amended Fifth Petition), filed December 1, 2016). The State moved to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). (Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction), filed December 12, 2016). Petitioner opposed this request. (Opposition to Motion to Strike, filed February 3, 2017). This Court held a hearing on March 17, 2017, and after entertaining argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006).

On March 27, 2017, Petitioner filed an opposition to the State's request to dismiss the Fifth Petition. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017). Respondent's reply to Petitioner's opposition follows.

ARGUMENT

Initially, this Court should reject Petitioner's blatant violation of Judge Villani's order striking the Amended Fifth Petition. Petitioner's decision to insert arguments struck with the Amended Fifth Petition into a reply to an opposition that said nothing about those arguments is utterly inappropriate. Further, this Court should ignore Petitioner's attempt to goad it into

unintentionally waiving his procedural defaults by addressing the substantive issue raised by the Fifth Petition. Finally, Petitioner's contention that he can dodge the procedural bars is premised upon a fundamental misrepresentation of Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). Since Hurst was a mere application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), the Fifth Petition is procedurally barred without excuse and should be summarily dismissed.

I. *Arguments Struck with the Amended Fifth Petition should be Disregarded*

This Court should decline to consider arguments offered in violation of Judge Villani's order striking the Amended Fifth Petition and Nevada's prohibition against seeking reconsideration of disposed of issues without leave of court.

The District Court Rules of Nevada (DCR) make clear that once an issue has been disposed of a party may not reassert the same complaint without securing leave of court in advance:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of court granted upon motion therefor, after notice of such motion to the adverse parties.

DCR 13(7).

The Rules of Practice for the Eighth Judicial District Court (EDCR) similarly bar litigants from repeatedly seeking the same relief:

> When an application or a petition for any writ or order has been made to a judge and is pending or has been denied by such judge, the same application, petition or motion may not again be made to the same or another district court judge, except in accordance with any applicable statute and upon the consent in writing of the judge to whom the application, petition or motion was first made.

EDCR 7.12.

The Nevada Supreme Court has held that the law does not favor multiple applications for the same relief. Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing ... The obvious reason for this rule is

that successive motions for rehearing tend to unduly prolong litigation"); 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."). The less than favorable view of successive applications for the same relief explains why there is no right to appeal the denial of a motion for reconsideration. See, Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 346 (1995). It also justifies why a motion for reconsideration does not toll the time for filing a notice of appeal. See, In re Duong, 118 Nev. 920, 923, 59 P.3d 1210, 1212 (2002).

The Fifth Petition raised only one issue, whether appellate reweighing of aggravating and mitigating circumstances was unconstitutional in light of Hurst. (Fifth Petition, p. 7-8). The Fifth Petition is silent as to whether the beyond a reasonable doubt standard applies to the weighing decision. Id. Petitioner raised the burden of proof issue in Claims One and Two of the Amended Fifth Petition as it related to appellate reweighing and the original jury determination. (Amended Fifth Petition, p. 7-9). However, this Court's decision to strike the Amended Fifth Petition disposed of the burden of proof issue. (Odyssey, Register of Actions, Minutes, March 17, 2017). As such, Petitioner's decision to insert claims regarding the burden of proof issue into his opposition to the State's motion to dismiss is an inappropriate end run around this Court's striking order and violates both DCR 13(7) and EDCR 7.12. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 13-14, 25, 29-33). This Court should not aid and abet such skullduggery. Instead, this Court must decline to address Petitioner's burden of proof claims.

To the extent that Petitioner may argue that his naked citation to Hurst in the Fifth Petition somehow preserved his specific burden of proof issue, he is wrong. See, Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993);

Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) ("This ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition. Hence, it need not be considered by this court."). The loss of the burden of proof issue is an appropriate consequence for Petitioner's decision to offer nothing more than naked citation to Hurst in the Fifth Petition. After all, it was Petitioner's responsibility to make an argument. See, Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

II. *Avoidance of Inadvertent Waiver of Petitioner's Procedural Defaults*

Petitioner has repeated castigated the State for failing to address his substantive claims. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 37-38; Opposition to Motion to Strike, filed February 3, 2017, p. 3). Such hyperbole is nothing more than a catspaw designed to secure an inadvertent waiver of Petitioner's procedural defaults. As the Federal Public Defender is well aware, state procedural default rules are waived if a state court addresses the merits of a federal claim instead of limiting its holding to the application of state procedural default rules. Green v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002) ("If the Washington Supreme Court declined to apply the procedural bar that was available to it and adjudicated the claim on the merits, then the claim may proceed"). As such, this Court should ignore Petitioner's attempts to goad the State and this Court into inadvertently waiving Nevada's procedural default rules. Obviously, if this Court should find a waiver of Petitioner's procedural defaults the State will seek leave of court to file a pleading addressing the merits of Petitioner's underlying claim.[9]

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[9] In order to avoid an inadvertent waiver of Petitioner's procedural defaults, the State will not address Petitioner's claims regarding the alleged meritorious nature of his Hurst complaint. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 36-42). Instead, the State will limit any analysis of Hurst to what is necessary to adjudicate Petitioner's failure to comply with the procedural bars.

III. *The Fifth Petition is Procedurally Barred*

As noted in the State's Opposition and Motion to Dismiss, Petitioner's Hurst claim must be dismissed as untimely, presumptively prejudicial, waived and abusive pursuant to NRS 34.726, NRS 34.800 and NRS 34.810. (Opposition and Motion to Dismiss, filed November 2, 2016, p. 13-17).

Nor are Petitioner's claims that various procedural bars are inapplicable to him without reference to good cause and prejudice persuasive. To the extent that Petitioner argues that his Hurst claim was not barred by NRS 34.726(1), NRS 34.800, NRS 34.810(1)(b)(2) and/or NRS 34.810(2) because he brought it within a reasonable time of the publication of Hurst, such contentions go directly to the scope of Hurst. Since Hurst was only an application of Ring, Petitioner's arguments fail. See, section IV, A, infra.

More troubling is Petitioner's fundamental misunderstanding of NRS 34.800. Initially, Petitioner attempts to shift the burden of proof under NRS 34.800(1)(a). Petitioner complains that "the State has not shown that a delay impaired in any respect its ability to oppose the petition." (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 21). However, the statute only requires that "the State of Nevada must specifically plead laches." NRS 34.800(2). Indeed, the statute creates a presumption that Petitioner must overcome. Id.

Petitioner also confuses the nature of the prejudice under NRS 34.800(1)(a). Petitioner alleges that the passage of time has not prejudiced the State because "[r]esolution of the petition turns on pure questions of law" so "[d]elay in the filing of the petition could not possibly have compromised the State's ability to address those legal matters." (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 21). If this Court does not dismiss the Fifth Petition based on the procedural bars the delay will must certainly prejudice the State. Petitioner devotes a considerable portion of his pleading to arguing that he has been prejudiced. He does not limit those arguments to purely legal issues. Instead, he extensively argues issues of fact related to his penalty hearing and new mitigation. (Reply in Support of Petition for Writ of

Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 14-18). Thus, if the State is required to respond to the merits of Petitioner's complaint it will be forced to address his various contentions about the penalty hearing and the new mitigation. This will prejudice the State because of the passage of time and because it will be forced to address the merits of the new mitigation.

IV. *Petitioner Fails to Justify Ignoring the Procedural Bars*

As detailed in the State's Opposition and Motion to Dismiss, 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). (Opposition and Motion to Dismiss, filed November 2, 2016, p. 17-20). Petitioner cannot make either of these mandatory showings. Petitioner cannot establish good cause to ignore his procedural defaults because Hurst was a mere application of Ring. As such, Petitioner was required to raise his reweighing complaint no later than one year after remittitur issued from the appeal of the denial of his Fourth Petition. Petitioner's failure to do so precludes a finding of good cause. Nor can Petitioner establish the substantial prejudice necessary to dodge the procedural bars since Hurst is not retroactive and he received all he was due under Hurst. Ultimately, a finding of prejudice is impossible in light of the Nevada Supreme Court's conclusion that the death sentence was supported by ample evidence.

A. *Hurst was a mere Application of Ring*

Whether Petitioner's Hurst claim is procedurally barred largely boils down to the scope of the holding in Hurst. Petitioner somehow reads Hurst as precluding appellate reweighing because the balancing of mitigation against aggravation is a factual finding under Ring and is subject to the beyond a reasonable doubt standard. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 10, 31). Petitioner's interpretation of Hurst strains the duty of candor to the court.

Hurst does not stray beyond a mere application of Ring and as such says nothing about the selection phase or the burden of proof applicable to the selection phase. Hurst set

out the statutory prerequisites for imposing a sentence of death and noted that Florida law required that those findings be made by a judge. Hurst, 577 U.S. at __, 136 S.Ct. at 622. The Court pointed out that the role of the jury under Florida law was advisory only. Id. Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 577 U.S. at __, 136 S.Ct. at 621-22. The entirety of 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.

Hurst simply does not stand for the propositions Petitioner attributes to it. Indeed, the Court specifically limited the scope of Hurst to aggravating circumstances when setting out the actual holding:

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

Id. at __, 136 S.Ct. at 624 (emphasis added).

Perhaps the strongest reason to reject Petitioner's dubious construction of Hurst is how the Supreme Court dealt with its own precedent in Hurst. Hurst cited Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990), without overruling it. Hurst, 577 U.S. at __, 136 S.Ct. at 622. This is interesting because Petitioner's view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances is in direct conflict with Walton:

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

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

Similarly, in overruling Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055 (1989), and Spanziano v. Florida, 468 U.S. 477, 104 S.Ct. 3154 (1984), Hurst stated, "[t]he decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty." Hurst, 577 U.S. at __, 136 S.Ct. at 624. If the Supreme Court intended Hurst to apply to more than aggravating circumstances it would have said so in addressing these precedents. That the Court specifically limited the invalidation of Hildwin and Spanziano to aggravating circumstances clearly brings into question the legitimacy of Petitioner's position.

Such a reading of Hurst comports with the great weight of authority construing the case. Davila v. Davis, 650 Fed.Appx. 860, 872-73 (5th Cir. 2016) (on appeal of district court's rejection of argument that Texas' death penalty statute was "unconstitutional … because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt" the Court concluded that "[r]easonable jurists would not debate the district court's resolution, even after Hurst."); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive a defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of the aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance … has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. … Nothing in Hurst … affects our conclusions in this regard.");

Ex parte Bohannon, 2016 Ala. LEXIS 114, p. 15 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio-8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring.").

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

Further, every federal circuit court to have addressed the argument that Ring imposed the reasonable doubt standard on the weighing of aggravating and mitigating circumstances—seven circuits so far—has rejected it, reasoning that the weighing process constitutes not a factual determination, but a complex moral judgment. See United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005). Controlling Nevada authority is in accord with these federal courts. Nunnery v. State, 127 Nev. 749, 772-76, 263 P.3d 235, 251-53 (2011). Under Petitioner's interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published more than a year ago. The fact that not one of these leading cases on the issue was even mentioned by the Court in Hurst belies Petitioner's assertion that Hurst addressed such an issue.

In opposition to all of this, Petitioner offers reliance upon a mere three cases. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 11-13). Citation to Hurst v. State, 202 So.3d 40, 44 (Fla. 2016), is of little value. It is true that the Florida Supreme Court concluded that the "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." Id. at 44. However, the Florida Supreme Court's holding provides scant support for Petitioner's position because only "the existence of each aggravating factor" was subjected to the "beyond a reasonable doubt" standard. Id. To the extent that the Florida Supreme Court adopted an overbroad interpretation of Hurst, such a view is not controlling authority in Nevada. Custom Cabinet Factory of New York, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 119 Nev. 51, 54, 62 P.3d 741, 742-43 (2003); Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 500(1987). More importantly, such an expansionist take on Hurst is contradicted by existing authority from the Nevada Supreme Court that is binding on this Court. Nunnery, 127 Nev. 749, 772-76, 263 P.3d at 251-53.

The Delaware Supreme Court's opinion in Rauf v. State, 145 A.3d 430 (Del. 2016), is extremely problematic. Rauf is a tortured opinion that reached consensus only on conclusions. Id. at 432-34. However, when asked whether Hurst applied retroactively, the Delaware Supreme Court distinguished Rauf from Hurst. Powell v. State, 2016 Del. LEXIS 649, p. 9 (Del. 2016) ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."). Thus, the burden of proof issue that the Delaware Supreme Court said was not at issue in Ring and Hurst but controlling in Rauf is the entire point of Petitioner's Hurst argument. Thus, any reliance upon Rauf would be highly questionable because only a few months after Rauf the Delaware Supreme Court distinguished Rauf from Hurst on the very burden of proof issue that is in contention here.

Petitioner's reliance upon the Ohio Supreme Court's unpublished grant of rehearing in State v. Kirkland, 145 Ohio St.3d 1455, 49 N.E.3d 318 (2016), serves only to demonstrate the sheer desperation of Petitioner to find even the most tenuous support for his argument. Kirkland was a five-sentence order that did not discuss or address Hurst. Id. Even Petitioner

admits that it is impossible to know why the Ohio Supreme Court remanded in Kirkland. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 35). Indeed, Petitioner's citation to Kirkland is questionable in the extreme since the Ohio Supreme Court has rejected his interpretation of Hurst in a published opinion. In State v. Belton, __ Ohio St.3d __, 2016-Ohio-1581, ¶ 55, __ N.E.3d __ (Ohio 2016), the Ohio Supreme Court adjudicated a capital defendant's contention that Hurst invalidated Ohio's death penalty because a jury was required to "determine the existence of any mitigating factors and … whether the aggravating … circumstances … outweigh those factors by proof beyond a reasonable doubt." The Ohio Supreme Court rejected this claim because:

> Ohio's capital-sentencing scheme is unlike the laws at issue in Ring and Hurst. In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); State v. Thompson, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

Id. at ¶ 59.

Petitioner's strained interpretation of Hurst fails to demonstrate good cause because Ring is the legal basis for his claim, which factually became available when the Nevada Supreme Court engaged in a reweighing analysis on appeal from the denial of the Fourth Petition. Ring was published in 2002 and remittitur issued from the appeal of the Fourth Petition on October 20, 2014. (Remittitur, dated October 20, 2014, attached to Clerk's Certificate, filed October 24, 2014). Under the most favorable analysis possible, Petitioner had until October 20, 2015, to bring a Ring challenge against the Nevada Supreme Court's reweighing decision. Petitioner's failure to do so is fatal because he cannot abuse Hurst to bootstrap himself into a timely Ring complaint. Crump v. State, 2016 Nev. Unpub. Lexis

374, p. 6-7, footnote 5 ("Riley would not provide good cause as it relies on Hern, which has been available for decades").[10]

B. *Hurst has Only Prospective Application*

Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 577 U.S. at __, 136 S.Ct. at 621-22. The entirety of the Court's discussion in Hurst focused on applying Ring to the case before it. Id. The Court ended the analysis by explicitly linking the ruling in Hurst to the rule of Ring. Id. at __, 136 S.Ct. at 622. The United States Supreme Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S.Ct. 2519, 2522-27 (2004). After an extensive analysis, Schriro concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S.Ct. at 2526-27. Further, other courts have concluded that Hurst is not retroactive. Asay v. State, 2016 Fla. LEXIS 2729, p. 11-12 (Fla. 2016) ("Hurst v. Florida should not apply retroactively to cases that were final when Ring was decided"); Reeves v. State, 2016 Ala. Crim. App. LEXIS 37, p. 106 (Crim. App. June 10, 2016) ("Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review").

Petitioner's conviction became final in 1988. The United States Supreme Court declined certiorari on October 5, 1987. On February 12, 1988, the Nevada Supreme Court issued remittitur in the direct appeal. Ring was published in 2002 and Hurst was published in 2016. As such, neither case applies to Petitioner's conviction and thus cannot substantiate the substantial prejudice necessary to ignore Petitioner's procedural defaults.

C. *Petitioner Received all the Process he was Due under Ring and Hurst*

Petitioner cannot use Hurst to dodge the procedural bars because he received all the protections due him under Ring and Hurst.

As explained in IV, A, supra, Hurst merely applied Ring. Hurst, 577 U.S. at __, 136

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

S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring "requires juries to find aggravating factors necessary for the imposition of the death penalty beyond a reasonable doubt." Runyon, 707 F.3d at 516. Petitioner's jury was instructed that it "may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt[.]" (Instruction 6, Instructions to the Jury, filed May 4, 1983, attached as Exhibit 1). As such, Petitioner received all the process he was due under Ring and Hurst.

Further, even if Hurst or Ring could be read to impose the beyond a reasonable doubt standard on appellate reweighing, Petitioner received the benefit of such a questionable interpretation of those cases. Appellate reweighing of a death sentence asks the question, "[i]s it clear *beyond a reasonable doubt* that absent the invalid aggravators the jury still would have imposed a sentence of death?" Bejarano v. State, 122 Nev. 1066, 1081, 146 P.3d 265, 276 (2006) (emphasis added).

Petitioner has received all he was entitled to under Hurst and Ring and as such he cannot demonstrate the substantial prejudice necessary to ignore his procedural defaults.

D. *Ample Evidence Supported Imposition of the Death Penalty*

Petitioner cannot establish the prejudice necessary to ignore his procedural defaults because more than sufficient evidence supported the jury's decision to sentence him to death. On appellate review of the denial of the First Petition the Nevada Supreme Court found that trial counsel deficiently failed to object to prosecutorial misconduct at the penalty hearing but declined to find prejudice because "the jury had ample reasons to find that the aggravating circumstances outweighed any mitigating circumstances." Howard, 106 Nev. at 720, 800 P.2d at 179. The Nevada Supreme Court held to this conclusion after reweighing the aggravating circumstances against the mitigating circumstances on appeal from the denial of the Fourth Petition. (Order of Affirmance, filed July 30, 2014, p. 12-13, attached to Clerk's Certificate, filed October 24, 2014).

/ / /

/ / /

CONCLUSION

Based on the foregoing, the Fifth Petition should be dismissed as procedurally barred without a showing of good cause and prejudice sufficient to ignore Petitioner's procedural defaults.

DATED this 4th day of April, 2017.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Reply to Opposition to Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction) was made this 4th day of April, 2017, by Electronic Filing to:

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(pro hac vice)
Assistant Federal Public Defender
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Counsels for Petitioner

/s/ E.Davis

Employee for the District Attorney's Office

JEV//ed

EXHIBIT 1

EXHIBIT 1

CASE NO. C53867

DEPT. NO. V

4:20 p.m.

FILED IN OPEN COURT

May 4 1983

LORETTA BOWMAN, COUNTY CLERK

Jan Duncan DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL HOWARD,

Defendant.

INSTRUCTIONS TO THE JURY

INSTRUCTION NO. I

MEMBERS OF THE JURY:

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

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

INSTRUCTION NO. 2

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

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

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

INSTRUCTION NO. 4

The jury shall fix the punishment at:

(1) Death, or

(2) Life imprisonment without the possibility of parole, or

(3) Life imprisonment with the possibility of parole.

INSTRUCTION NO. 5

You are instructed that the sentence of life imprisonment without the possibility of parole does not exclude executive clemency.

INSTRUCTION NO. 6

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

The defendant has alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the defendant should be sentenced to life imprisonment or death.

The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

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

INSTRUCTION NO. 7

The burden rests upon the prosecution to establish any aggravating circumstance beyond a reasonable doubt.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

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

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

(2) The murder was committed while the defendant was engaged in the commission of any robbery.

INSTRUCTION NO. 10

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 11

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

The offense of Robbery is a felony under the laws of the State of Nevada.

INSTRUCTION NO. 12

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

1. Any other mitigating circumstances.

INSTRUCTION NO. 13

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

INSTRUCTION NO. 14

The law recognizes two classes of evidence; one is direct evidence, and the other is circumstantial evidence.

Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

INSTRUCTION NO. 15

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 16

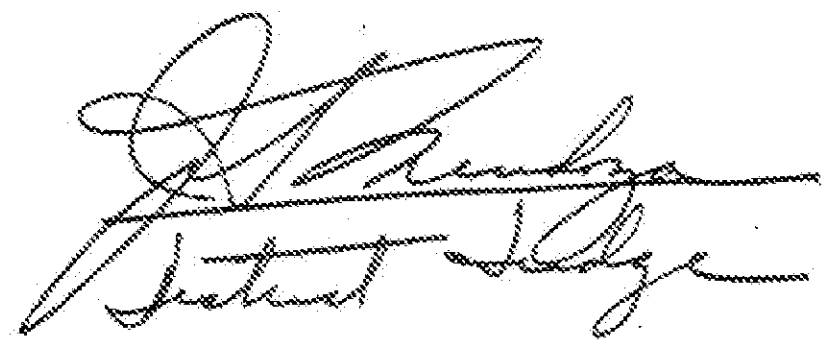
The Court has submitted two sets of verdicts to you. One set of verdicts reflects the three possible punishments which may be imposed. The other set of verdicts are special verdicts. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance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

It will be the jury's duty to select one appropriate verdict pertaining to the punishment which is to be imposed and one appropriate special verdict pertaining to the jury's findings with respect to aggravating and mitigating circumstances.

INSTRUCTION NO. 17

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

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



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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. SAMUEL HOWARD, aka, Keith, Defendant.	CASE NO. 81C053867 DEPT. XVII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 17, 2017

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
STATE'S MOTION TO STRIKE AMENDED FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

APPEARANCES:

For the State: JONATHAN VANBOSKERCK, ESQ.
Chief Deputy District Attorney

For the Defendant: DEBORAH CZUBA, ESQ.
(Appearing telephonically)
JONAH HORWITZ, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: CYNTHIA GEORGILAS, COURT RECORDER

LAS VEGAS, NEVADA, FRIDAY, MARCH 17, 2017

[Proceedings commenced at 9:33 a.m.]

THE COURT: Good morning, everyone. Have a seat.

MR. HORWITZ: Good morning, Your Honor.

MS. ARMENI: Good morning, Your Honor.

MR. VANBOSKERCK: Good morning.

THE COURT: Let me get my notes in line here.

MR. VANBOSKERCK: Judge, before you call the case, just your recorder has asked us once you call it to come up to the table there so the mic will pick us up. I just want to make sure that's okay with you.

THE COURT: Yes, absolutely.

MR. VANBOSKERCK: Thank you.

THE COURT: All right, State versus Howard. I have an argument on the writ, so why don't we have counsel come up and give us your appearances for the record, please.

And do we have court call on, Cynthia?

THE RECORDER: Yes, Judge.

THE COURT: Okay. And who is on the phone?

MS. CZUBA: Yes, Your Honor, this is Debra Czuba from the Federal Public Defender office.

THE COURT: All right.

Counsel.

MR. HORWITZ: Thank you, Your Honor. This is Jonah Horwitz also from the Federal Public Defender here on behalf of the Petitioner, Samuel Howard.

THE COURT: Okay.

MS. ARMENI: Good morning, Your Honor, Paola Armeni, acting as local counsel on behalf of Samuel Howard.

MR. VANBOSKERCK: Your Honor, Jonathan Vanboskerck for the State.

THE COURT: All right.

Okay, this is -- well, we have the petition and there's a motion to strike the amended fifth petition. So, who's arguing on behalf of the Defendant or on the Petitioner?

MR. HORWITZ: I am, Your Honor.

THE COURT: Okay. And so, State, you have a motion to strike the amended --

MR. VANBOSKERCK: Yes, Your Honor.

THE COURT: -- fifth petition.

MR. VANBOSKERCK: The amended fifth.

THE COURT: Go ahead.

MR. VANBOSKERCK: Judge, NRS 74.750(5) says you can't file a supplemental pleading without leave of the court. *Barnhart* tells us that leave of court means good cause, an explanation for the delay. In fact, in *Barnhart* they affirmed the denial of leave because Defense never gave an explanation for delay. But that's exactly what happened here. Four different branch offices of the FPD in 18 different capital habeas cases filed *Hurst* supplements without leave of court, without an explanation for the delay.

Recently in a new opinion the Nevada Supreme Court, in *Righetti* of the Eighth Judicial District Court, it's not in the pleadings because it's so new, this cite is 133 Nev. Adv. Op. 7, in a capital case said that, I'm quoting from page 10, less than forthright advocacy should not be rewarded and incentivized. But that's what really

is going to happen here if you don't strike the fifth -- the amended fifth petition.

What happened? The FPD saw a chance to delay execution of sentence by waiting to the last minute to file their *Hurst* complaint to the eve of the time bar. But to do that they violated *Barnhart* and the statute.

The concern for us, obviously, is that it's a delaying game. It's all about delay imposition of sentence as opposed to having a real issue and litigating it. You know I realize that I've kind of put you in a tough place because I've called them on their gamesmanship, and on one hand you have Mr. Howard facing a death sentence, and on the other hand you've got gamesmanship by the FPD. As a practical matter, what I'm really asking you to do is punish Mr. Howard because of the games his attorneys are playing.

Now, I stand by the pleading. I think it's appropriate. In fact, in *Larry Adams*, Judge Earley struck their *Hurst* pleading there on the basis of the violation of the statute. So, I think it's perfectly appropriate if they're going to try to gain the system and don't quite succeed, to let them face the time bar. But if you feel that my request is disproportionate in terms of the potential impact on Mr. Howard, I get that, I respect that. But what I would -- bottom line what I'd ask for, at the minimum, is a factual finding by this Court that the FPD as an organization -- 'cause I'm not looking for something stupid like a bar complaint, the FPD as an organization has engaged in bad faith or even less than forthright advocacy by trying to gain the system the way they did. The reason I'm asking for that is because the Federal Public Defender cannot come into state court and play games with our habeas cases. And the only way that's going to stop is a clear statement from our judiciary to the FPD that you have to play by the rules and play by rules in good faith.

So with that, unless the Court has any questions, we would submit on

the motion to strike.

THE COURT: No, I don't have any questions.

Counsel, you want to come so --

MR. HORWITZ: Sure.

THE COURT: -- you're picked up?

MR. HORWITZ: Absolutely.

MR. VANBOSKERCK: Would you like me to stay or go?

THE COURT: Oh, no that's fine. You can stay right there.

And, Counsel, I have a question. In your petition of October 5th, okay, the -- not the amended, in the petition --

MR. HORWITZ: Sure.

THE COURT: -- you do identify *Hurst*, okay, so why do we need the amended if you were obviously aware of the *Hurst* decision and you argued it in your petition of October 5th?

MR. HORWITZ: Right. Absolutely, Your Honor. We were aware of *Hurst*. The two claims are distinct. The first claim addresses the appellate reweighing that the Nevada Supreme Court undertook in 2014 in Mr. Howard's most recent post-conviction proceeding. The new claim addresses the jury's actual weighing of mitigation against aggravation. So those are distinct legal theories that we're asserting directed at different phases of the case.

Hurst I think it's a fast evolving area of law. It's led to a lot of new decisions from the state supreme courts. We cited a couple from Delaware and Florida which essentially invalidated those jurisdictions' death penalties. So it's an area of law that's fluid. I think new theories based on *Hurst* are emerging at a very fast pace. So that's essentially the explanation for why the second claim was added

shortly thereafter and it was only two months after the original petition was filed that we incorporated that claim.

THE COURT: Do -- and this -- maybe this would apply to both sides, how many more amendments do we have? No, I mean, at what point do we stop? And with due respect to state court, you know I think unfortunately we are more lenient than the federal court judges because when there's a deadline in federal court, at least in my experience from reading decisions and being a litigant, or you know an advocate for a party, there were hard and fast rules. The state court, depending on which department you're in, depending on what was the issue, you know rules are more guidelines it's just a concern that I have, and as best as I can on my cases, I'm sure its -- I'm not 100%. I try to you know let the word go out that I'm going to follow the rules in my courtroom. Now, if there's any comment by either side regarding my observation.

MR. HORWITZ: Sure. Just briefly, Your Honor.

We don't anticipate any further amendments at this time. We just wanted to make sure that Mr. Howard didn't lose the benefit of an important new constitutional decision from the US Supreme Court in the form of *Hurst* so we wanted to get our bases covered. I think claim 2 is very well grounded in the state Supreme Court decisions that you're seeing from other states. The Delaware Supreme Court and the Florida Supreme Court both extended *Hurst* to the jury's weighing against -- weighing of aggravation against mitigation and they both made *Hurst* retroactive, so we wanted to make sure that we were timely on that claim and that we were protecting Mr. Howard's interest. But we don't intend on filing anymore amendments at this time.

MR. VANBOSKERCK: And, Judge, just on that briefly. I mean I dispute

some of his interpretation of the law but I'll save that for the substantial argument, but assuming everything he said was true, both of those opinions, I think the Delaware Supreme Court's decision on -- where was that -- their initial decision in *Powell* was in December of 2016. Their decision that was retroactive was in August of 2016. And on remand in *Hurst*, the Florida Supreme Court decided theirs in October. So, all of those precedents predate or are contemporaneous with the filing of the fifth petition. So again, there's no explanation why they weren't included in the petition other than to create delay. And when you look at the global picture of them pulling the same stunt in 18 different cases involving four different offices, I can't see other -- any other explanation than an intent to intentionally delay our cases for the sake of frustrating execution of sentence.

MR. HORWITZ: Could I briefly respond to that, Your Honor?

THE COURT: Well, at this point -- I mean is there really anything new that you're bringing up? You're just saying some other state cases, state Supreme Court cases. I mean I'm going -- you know I'm going to look -- I read everything; okay? You know I'm going to look at the US Supreme Court and the Nevada State Supreme Court. That's what I think is authoritative on this issue.

MR. HORWITZ: Those are the cases that I think have brought these issues to our attention and those cases are evolving quickly. I think the mistake the State is committing is conflating his procedural default arguments that are directed at the petition itself with its arguments on the amendment. I think what the State is doing is setting a clock that began ticking with *Hurst* and saying that that's the delay that took place with respect to the amendment when that is not, in fact, the case. When courts consider a delay in seeking an amendment, they look at when the original petition was filed. That's really the timeline that's relevant to this issue that we're

here on today. And that timeline is two months so it's really not a substantial period of time. The arguments that the State can make about the delay from *Hurst* are arguments that it can raise in its motion to dismiss the amended petition.

THE COURT: I'm curious, what happens in federal court?

MR. HORWITZ: In federal court it's very well established that you have to seek leave to amend. All parties know that, which I think is a distinction with Clark County District Court, at least as far as our research led us to believe. It seemed like there was a practice of simply filing amended petitions which is why the -- that's the course we took. We would have been more than happy to file a motion for leave to amend if it seemed like that was the --

THE COURT: Well, a federal court judge sitting in Las Vegas would say its stricken; is that correct?

MR. HORWITZ: I think that's probably correct, Your Honor. I think if a party filed an amended petition without seeking leave in advance it would be stricken and that's why I tried to be as careful as I could in pursuing the amended petition. And my assumption going in was that I would need to file a motion for leave to amend, but when I looked at the cases and consulted local post-conviction attorneys, their view was all unanimously essentially that that's not what's done in Clark County. So, that's the reason that we filed this procedure. We had no -- there was no nefarious motive, contrary to what the State is suggesting. We would have been more than happy to file a motion for leave to amend.

MR. VANBOSKERCK: If I could just respond to that briefly?

THE COURT: Sure.

MR. VANBOSKERCK: Mr. Pescetta is the -- basically the team chief of the FPD's capital habeas litigation unit here in Las Vegas. In --

MS. CZUBA: That's not true, Your Honor. He's not the chief anymore.

MR. VANBOSKERCK: Okay, but he was at one point.

THE COURT: I'm going to have one person argue the motion and that is my rule and I stick to that rule.

Go ahead, Counsel.

MR. VANBOSKERCK: If I'm factually incorrect, Your Honor, I apologize. I would submit that he was at one point team chief, and in fact, is -- his name is well known as a habeas litigator here in Clark County for the Defense side.

In *Larry Adams*, two of those motions to strike on the basis of 34.750(5) were granted before they even filed their petition here. So, all they had to do was pick up the phone and talk to someone in their own office located here to hear that judges here were enforcing it.

MR. HORWITZ: Your Honor, could I --

MR. VANBOSKERCK: And --

MR. HORWITZ: I'm sorry.

THE COURT: Go ahead, sir.

MR. VANBOSKERCK: If I could just --

THE COURT: Sure go ahead.

MR. VANBOSKERCK: -- follow up on that briefly. As to the federal court concern, that's part of the concern here because like I pointed out in *Larry Adams*, Judge Earley has granted now three of these. Well, in their opposition they point out or they try to argue that if we're not being consistent in applying these things federal court will then say it doesn't count just like they did per 34.810. Well, if the rule applies and you don't apply it, you're essentially creating the argument for federal court that that Nevada statute has no force and that's something this Court should

not do.

THE COURT: Okay. I -- like I said, this Court, Department 17, endeavors to file the deadlines whether civil or criminal cases. I've stricken experts in civil cases. I've stricken pleadings. And, Counsel, you practice in federal court. You know that deadlines are deadlines. And so, I am granting the motion to strike the amendment --

MR. HORWITZ: Could I just say --

THE COURT: -- to the fifth --

MR. HORWITZ: -- something very quickly?

THE COURT: -- petition. I ruled, Counsel.

MR. HORWITZ: Okay.

THE COURT: Okay.

All right, let's get to the heart of what we have now. All right, it's your petition.

MR. HORWITZ: Okay.

So, Your Honor, you'd like me to make an argument on the merits of our -- the one --

THE COURT: Oh, yeah, absolutely.

MR. HORWITZ: -- claim in the original --

THE COURT: Right.

MR. HORWITZ: -- petition? Okay.

Our claim essentially, Your Honor, is that the Nevada Supreme Court violated the Sixth Amendment when it engaged in appellate reweighing on the fourth post-conviction petition that Mr. Howard brought. What the Nevada Supreme Court did was to strike one of the two aggravators in Mr. Howard's case. It struck the

aggravator that was based on the commission or robbery during the commission of murder. The Nevada Supreme Court often refers that to a -- refers to that as a *McConnell* aggravator. So the *McConnell* aggravator was struck. The Nevada Supreme Court then weighed the mitigation against the remaining aggravator, which was an aggravator based on a prior conviction of a violent felony, and it said that in its independent judgment the aggravations still outweigh the mitigation and that still merited a death sentence.

We think under the plain language of *Hurst* that that is now unconstitutional. What *Hurst* said was that anything that exposes a Defendant to a higher sentence, to a potential death sentence is a fact that must be considered by the jury. And that is now the law of the land. That is the ultimate statement on what the Sixth Amendment means. We think what the Nevada Supreme Court did here clearly ran afoul of that rule from *Hurst*.

THE COURT: Well, the jury found both -- I mean the Supreme Court vacated or struck one of the aggravators, but the jury found the other aggravator and imposed the imposition of death.

MR. HORWITZ: It did. It did, Your Honor. But the jury never had an opportunity to weigh the mitigation against the, what is now the only valid aggravator, which is the prior violent felony aggravator. So that is an opportunity that the jury is entitled to take under the Sixth Amendment. It's a finding that the jury is required to make under the Sixth Amendment.

THE COURT: And the argument by the State is that the *Hurst* issue is really -- follows the *Ring* decision from '02 and that the clock should have started ticking in '02; if you can address that.

MR. HORWITZ: Sure. Absolutely.

We disagree with that theory. We think *Ring* addressed a different set of circumstances. It addressed a much clearer cut distinction between the judge and the jury in Arizona which was the regimen that was at issue in *Ring*. The jury -- the judge essentially handled the entire sentencing, so the *Ring* decision invalidated a capital statute that was drafted in that sort of fashion.

What *Hurst* did was extend *Ring* to a situation in which the jury is still involved in the sentencing. It's just not involved sufficiently. It's not making all of the fact finding that it's required to make. And that's, I think, where the Delaware and Florida Supreme Court decisions come in because that's exactly what they say that *Ring* hadn't made this aspect of the Sixth Amendment clear and that *Hurst* broadened the ruling and applied it across the board to judicial involvement in the capital sentencings.

THE COURT: And are you asking me to basically overrule the Nevada Supreme Court you know after they struck one of the aggravators and then let the death penalty stand? I mean am I -- are you putting me in a position to overrule the Nevada Supreme Court?

MR. HORWITZ: I wouldn't put it quite like that, Your Honor. I think the Nevada Supreme Court, when it ruled in 2014 in Mr. Howard's case, it didn't have the benefit of *Hurst* which was decided in January of 2016. So I think the ruling that we would ask this Court to make is that the Nevada Supreme Court's prior approach to appellate reweighing in capital cases was legitimate at the time under US Supreme Court of law in 2014 when it did it. It's just been abrogated by the US Supreme Court and it's now unconstitutional. I think that was exactly the case in other states, the Ohio Supreme Court decision that we mentioned in -- I'm sorry, we haven't had an opportunity to file a response to the motion to dismiss yet. And just

by the way, Your Honor, we would appreciate the opportunity to do that before any ruling is rendered since we were -- we were proceeding on the assumption that we would get a chance to file a formal pleading in response to the motion to dismiss. But the higher Supreme Court has extended *Hurst* to appellate reweighing in exactly the way that we think it ought to be extended. In the Ohio Supreme Court, like the Nevada Supreme Court, prior to *Hurst*, was operating on the assumption that it could engage in appellate reweighing in capital cases. We think that's no longer the case and that it's now unlawful.

THE COURT: And is your position that the standard of Nevada should be that the aggravators outweigh beyond a reasonable doubt the mitigators or is that still part of the claims here?

MR. HORWITZ: Well, that was, I think, more essential to claim 2. I would say it's still the claim that was struck from the petition. I would say that it's still -- I think that it is still an issue in claim 1. I think they're closely related. And the jurisdiction's like Florida and Delaware that have extended *Hurst* have -- at least there is some language in those opinions to suggest that it is a -- with the extension of *Hurst* there is now a reasonable doubt requirement that has been imposed on that weighing process. So, I would agree with that, Your Honor.

THE COURT: All right.

MR. HORWITZ: And I would also say just on a side note, we would I think -- if the motion to strike was granted on the basis that we didn't seek leave in advance of filing the amended petition, we would ask for an opportunity to file a formal motion seeking leave to add the second claim.

THE COURT: All right. Thank you.

Anything else? I didn't want to cut you off.

MR. HORWITZ: Oh, no, no, --

THE COURT: Anything else?

MR. HORWITZ: -- no, no, Your Honor.

THE COURT: All right.

All right, go ahead, Counsel.

MR. VANBOSKERCK: Judge, just procedurally, since they've indicated -- and honestly I don't recall that they did not get an opportunity to reply to the opposition but to the motion to dismiss, if Your Honor would like to rule today I would have no objection to withdrawing the -- this motion to dismiss part, or rather the motion to dismiss part and just standing on the opposition. I think you can consider the procedural bar in the context of either or both.

But regardless, even if everything Defense counsel just said is right, this claim is independent and procedurally barred because the Nevada Supreme Court weighed in 2014 *Hurst* is absolutely clear that they are applying *Ring*. That's the extent of *Hurst*. They say in their conclusion to the same extent that Timothy Ring was entitled -- I'm sorry, I can't remember the quote, but they essentially equate their ruling with the same ruling in *Ring*. I gave you the quote in the opposition. So, if *Hurst* is an application of *Ring*, *Ring* is 2002, reweighing happens in 2014. So even if they're absolutely right, it's still independently barred because they should have come in in 2015 with this claim on the basis of *Ring* and the reweighing.

But the bottom line is they're not right here. *Hurst* is abundantly clear that it is simply applying *Ring*. Anecdotally, just recently, and it didn't make it into our pleadings because I don't believe it had been published prior to our pleadings, but the Nevada -- excuse me, the California Supreme Court recently ruled that *Hurst* did

not apply retroactively essentially saying *Hurst* is equivalent to *Ring*. That went up on a cert petition to the US Supreme Court and they denied it. So, if *Hurst* really was as broad as they're saying, the US Supreme Court should have granted cert in that position to make it clear to the California Supreme Court. And if the Court would like the cite I can get it to you later. I don't have it off the top of my head.

But also if you look at the structure of *Hurst* itself, the way they dealt with their precedent inside of *Hurst* suggests that they're only looking at the aggravators. They cite to *Walton* and they overrule two cases in *Hurst*. And they're very clear when they're overruling. They're only overruling as to the aggravating circumstances. They don't overrule *Walton* and in *Walton* they specifically say that states can require the Defendant to prove mitigation. So if they were to try to impose this new burden that the jury had to find that mitigation outweighed aggravator beyond a reasonable doubt, they should have overruled *Walton* just like they did with other cases in *Ring*.

But bottom line, Judge, you're initial instinct here was absolutely right. They are asking you to overrule the Nevada Supreme Court. *Nunnery* is abundantly clear. *Nunnery* addressed *Ring*. *Lyle* addressed *Ring*. And every time it's gone up to our court, our court says, no, *Ring* doesn't apply to the weighing component, the selection phase. That's the law of the land in Nevada. If anyone is going to overrule that it has to be the Nevada Supreme Court. So even if they're 100% right, you still need to deny on the basis of Nevada precedent and let them take it to the Nevada Supreme Court.

With that, -- excuse me, sorry, my allergies -- I would --

THE COURT: Wasn't this my -- wasn't my court involved in the last round of *Lyle*?

MR. VANBOSKERCK: I honestly don't know, Judge.

THE COURT: I mean there's been numerous rounds. I think --

MR. VANBOSKERCK: I don't remember. I apologize.

THE COURT: Okay.

Anything further, Counsel?

MR. HORWITZ: Yeah, just briefly, Your Honor.

All right, with respect to the State's position that the Court can rule on the merits of the petition right now, I think these are serious constitutional claims that are being raised now. I think they're complicated issues. I think both parties and the Court would benefit if Mr. Howard were given an opportunity to file a formal opposition in some form to the State's motion to dismiss where we could brief this in more detail.

To the State's assertion that the Supreme Court's denial of cert in the California case is significant, I would strongly disagree. I think it's very well established that the US Supreme Court has a series of criteria that it considers in deciding whether to grant cert and it often will go years and years without clarifying an area of law and then overrule its own precedent which in fact is exactly what it did in *Hurst*. So, I think an argument like that is tantamount to saying the US Supreme Court's refusal to reconsider the Florida regimen in light of *Ring* and its other sixth amendment cases that that shows that the Florida system was legally correct which is plainly not the case.

And again on the overruling point, I think that the State is mischaracterizing this issue by saying that we are asking the Court to overrule *Nunnery* and *Lyle*. Our position is that *Hurst* overruled those cases. The US Supreme Court obviously is the final authority on the meaning of the Sixth

Amendment. *Nunnery* and *Lyle* were both decided before *Hurst* came down. So we think if a higher court has abrogated those decisions its incumbent on any court to acknowledge that fact that those cases are no longer good law.

Does the Court have any questions?

THE COURT: No, no, I do not.

MR. HORWITZ: Okay. Thank you.

THE COURT: I just want to make sure I have all the pleadings here.

[Colloquy between Court and law clerk]

THE COURT: Okay, State, I just want to make sure I understood on -- there's a motion to dismiss. What would be your position on giving them an opportunity to respond? Because I'm trying to get all the pleadings because we have a set of pleadings to strike; as you know we dealt with that. And so we had the petition. We have the opposition and motion to dismiss. And then I don't have another pleading from the -- from Mr. Howard. I'm trying to keep all these straight; pardon me.

MR. VANBOSKERCK: Yeah, these things tend to grow.

Number one, again, if the Court wants to rule, I'm happy to withdraw the motion to dismiss part and just go on the opposition. However, I think you could not dismiss and rule on this. There's a specific district court rule on point. I think its district court Rule 13 that sets out the time frames for replies and oppositions and they're outside that time frame. So, I think you could legitimately rule since they haven't filed within the time frame. I think its 7 or 10 days or what not. However, if you want to let them, I have no objection. I'll submit it to the Court, but I do think you're in a position where you could rule because you rightly pointed out really the arguments are there. We've all put out the core of our thoughts. I mean, yes, maybe we could put in a few citations, different -- make a few additional arguments, but the

essence of what we're arguing is not going to change.

THE COURT: I'm going to give the -- Mr. Howard an opportunity to file a responsive pleading. Have that submitted 10 days from today. The State will have 10 days thereafter. And then it will be on chambers calendar.

[Colloquy between Court and clerk]

THE COURT: I put it on my chambers calendar. It's more of a tickler system. No one shows up for the chambers calendar. It just forces me to know I have a decision to make and get the decision out, so.

THE CLERK: So then two weeks for your calendar [indiscernible]?

THE COURT: Yes.

THE CLERK: Okay, so I have March 27th; thereafter April 7th and then two weeks after April 7th --

THE COURT: And that would be a Wednesday.

THE CLERK: You want it on a Wednesday?

THE COURT: Yeah.

THE CLERK: It would be the 19th of April, chambers calendar.

MR. VANBOSKERCK: Thank you, Your Honor,

THE COURT: All right. And you need to have timely filings. If not, I will not consider it.

Thank you, Counsel. Have a great weekend.

MR. VANBOSKERCK: You too, Your Honor.

MR. HORWITZ: Thank you, Your Honor.

MS. ARMENI: Thank you.

THE COURT: Thank you.

THE RECORDER: Thank you, Ms. Czuba.

MS. CZUBA: Thank you.

[Proceedings concluded at 10:02 a.m.]

* * * * *

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

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

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DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

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

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing[1]:
Time of Hearing:

(Death Penalty Case)

[1] As explained below, Mr. Howard believes that it would be most appropriate for the Court to rule on the instant motion before holding a hearing on the State's motion to dismiss the original petition, filed November 2, 2016. Therefore, Mr. Howard would not object if the instant motion were ruled upon without a hearing. Alternatively, the Court could schedule a single hearing to address both this motion and the State's motion to dismiss. *See infra* at 13.

MOTION TO AMEND OR SUPPLEMENT

Petitioner Samuel Howard has a compelling constitutional challenge to his death sentence based on a landmark new decision from the United States Supreme Court. The challenge was embodied in Claim Two of Mr. Howard's amended petition for post-conviction relief, filed on December 1, 2016 (hereinafter "Amended Petition" or "Am. Pet."). On March 17, 2017, the Court struck the amended petition because Mr. Howard did not seek leave before filing it. Mr. Howard therefore seeks leave now. In accordance with EDCR 2.30, the amended petition is attached. *See* Ex. 1. As explained in the accompanying memorandum of points and authorities, leave is proper and should be given.

DATED this 6th day of April 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

By way of background, Mr. Howard filed his amended post-conviction to add a single claim to his petition—Claim Two—in which he asserted that his death sentence violates *Hurst v. Florida*, 577 U.S. ---, 136 S. Ct. 616 (2016), on the ground that his jury did not find beyond a reasonable doubt that the aggravation outweighed the mitigation. *See* Am. Pet., at 8–9. After doing extensive research and determining that post-conviction petitioners in Clark County overwhelmingly filed amended petitions without seeking leave in advance, and that the Clark County District Attorney's Office and this Court had accepted such a protocol, *see* Opposition to Mot. to Strike, filed Feb. 3, 2017 (hereinafter "Oppo."), Ex. 1, at 2, Mr. Howard followed that course.

Contrary to its own well-established practice, the State filed a motion to strike the amended petition. *See* Mot. to Strike, filed Dec. 12, 2016 (hereinafter "Motion to Strike" or "MTS"). The Court likewise departed from its normal approach and struck the amended petition, on the basis that no leave was requested prior to its filing, in an oral ruling rendered on March 17, 2017. *See* Ex. 2, at 10. Mr. Howard therefore promptly drafted a motion for leave to amend. However, because the Court's order was oral and because its scope was not entirely clear, Mr. Howard postponed the submission of his motion until his attorneys could review the transcript of the hearing and ensure that the motion was accurate and appropriate. The transcript was received by undersigned counsel on April 5, 2017. *See id.* at 1. He consequently files his motion one day later, respectfully seeking leave to amend his petition to add a single claim, denominated as Claim Two in the attached amended petition. *See* Ex. 1, at 8–9.

It is not clear what test governs this Court's consideration of a request for leave to amend a post-conviction petition, but regardless of what the criteria are, permission is warranted.

The only precedential case the State has to date cited in which an inmate was denied authorization to amend a petition is *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006).[2] To

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[2] Aside from *Barnhart*, the only cases the parties have cited thus far dealing with the amendment of post-conviction petitions are *Miles v. State*, 120 Nev. 383, 91 P.3d 588 (2004), and *State v. Powell*, 122 Nev. 751, 138 P.3d 453 (2006). Neither case purports to lay down a test for evaluating requests for leave to amend.

the extent that any general standard can be gleaned from that case, it is that amendment should be denied where there is no notice to the State and no opportunity for the State to respond. *See id.*, at 303–04, 130 P.3d at 652. That is manifestly not the case here. There can be no doubt that the State is fully capable of addressing Claim Two, as it has already begun doing so. *See* MTS, at 19–22. The only potential prejudice that has accrued to either party in connection with the amendment has been the delay generated by the State's own motion to strike, which it certainly cannot complain about with any legitimacy. Using *Barnhart* as the legal framework, amendment here is warranted.

As for other potential factors the Court may wish to consider, one set comes from NRCP 15(a), which governs the amendment of complaints in civil suits. Granted, the Nevada Supreme Court has held that the rule does not control in post-conviction matters. *See Powell*, 122 Nev. at 755–59, 138 P.3d at 456–58. Nonetheless, the rule describes the general circumstances in which courts grant leave to amend a major initial pleading, the exact question at issue now. As such, its factors are useful guideposts to the inquiry here. *Cf. Mayle v. Felix*, 545 U.S. 644, 655, 125 S. Ct. 2562, 2569 (2005) (applying Federal Rule of Civil Procedure 15(a) to federal habeas cases). Indeed, even if the Court regards it as improper to cite NRCP 15(a) in a post-conviction matter, Mr. Howard submits that its factors would still be relevant, regardless of what source those factors are attributed to.

The first factor is "undue delay." *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000). Mr. Howard presented his original petition on October 5, 2016. Approximately six months have passed from that date. That period of time does not constitute an undue delay. *See McKenna v. State*, Clark Cnty. Dist. Ct., No. 79C044366, Order filed March 1, 2017 [Ex. 3] (permitting a *Hurst* amendment where the original petition was filed more than four years earlier); *Powell*, 122 Nev. at 758, 138 P.3d at 457 (determining that leave to supplement was properly granted for a claim that was raised almost three years after the initial petition was filed); *Miles*, 120 Nev. at 387, 91 P.3d at 590 (concluding that leave to amend should have been granted to cure an error discovered nearly a year after the initial petition was filed).

At the March 17 hearing, this Court expressed an interest in how the federal judiciary approaches the question of amendment. *See* Ex. 2, at 8. A brief glance at those courts' rulings confirms that the delay here is not undue. Utilizing the framework associated with the federal version of Rule 15, district court judges in Nevada have routinely granted leave to amend years after the initial petition was filed. *See Browning v. Baker*, D. Nev., No. 3:05-cv-087, ECF No. 116, at 1[3] (granting leave to a death row inmate to amend a habeas petition that was originally filed more than six years earlier); *Hogan v. Baker*, D. Nev., No. 2:97-cv-927, ECF No. 130, at 2 (eleven years); *Petrocelli v. Angeloni*, D. Nev., No. 3:94-cv-459, ECF No. 147, at 2 (thirteen years). Mr. Howard's own federal habeas case is instructive. There, Judge Hicks authorized an amendment to the petition more than twenty-two years after the original petition was filed. *See Howard v. Baker*, D. Nev., No. 2:93-cv-1209, ECF No. 320. In so ruling, these judges have found periods of twenty-two, thirteen, eleven, and six years to not constitute undue delay. With that in mind, it would be untenable to find that the time between the initial petition and the amendment here—six months—was an undue delay.[4]

Futility is the next consideration. *See Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013). It takes little effort to see how non-futile Claim Two is. For present purposes, it suffices to say that two state high courts have now interpreted *Hurst* as extending to the jury's weighing process, one of the main preconditions upon which Claim

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[3] The citations to federal district court dockets in this motion are publicly available at https://www.pacer.gov. If this Court would like the cited documents to be provided as exhibits, Mr. Howard would be happy to do so.

[4] The State has occasionally intimated that the delay for purposes of this issue is the delay between *Hurst*'s issuance and the amendment. *See* Reply in Supp. of Mot. to Strike, filed Feb. 6, 2017 (hereinafter "MTS Reply"), at 20. That is incorrect. When *amendment* is being debated, the question is—naturally—whether the party delayed *in amending*. *See Mo. Housing Dev. Comm'n v. Brice*, 919 F.2d 1306, 1316 (8th Cir. 1990) ("Under Fed. R. Civ. P. 15(a), an amendment to an answer 'clearly will not be allowed when the moving party has been guilty of *delay in requesting leave to amend* and, as a result of the delay, the proposed amendment, if admitted, would have the effect of prejudicing another party to the action.'" (quoting 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1488, at 659–62 (2d ed. 1990) (emphasis added))).

Two rests. *See Rauf v. State*, 145 A.3d 430, 435–79 (Del. 2016) (per curiam) (Strine, C.J., concurring)[5]; *Hurst v. State*, 202 So. 3d 40, 53–54 (Fla. 2016), *cert. pet. filed* (16-998) (Feb. 16, 2017). One of those high courts has also explicitly endorsed another main precondition of Claim Two, that *Hurst* compels juries to use a reasonable doubt standard at the weighing stage. *See Rauf*, 145 A.3d at 433, 437. And both of the high courts have given their *Hurst* interpretations retroactive effect, dealing with yet another potential hurdle to relief. *See Mosley v. State*, 209 So. 3d 1248, 1274–83 (Fla. 2016); *Powell v. State*, 153 A.3d 69, 71–75 (Del. 2016) (per curiam). Given this body of highly germane law that adopts the exact same legal principles that are behind Mr. Howard's claim, the claim is not futile.[6]

Another potential futility issue is timeliness, but any timeliness impediment is taken care of by *Powell*. There, the prisoner filed a timely post-conviction petition in February 1998. *See Powell*, 122 Nev. at 754, 138 P.3d at 455. Almost three years later, he supplemented the petition with a new claim. *See id.* at 755, 138 P.3d at 456. The State objected that the new claim did not relate back to the original petition, and was accordingly untimely. *See id,* 138 P.3d at 456. Not so, held the Nevada Supreme Court, which reasoned that the statutes setting forth the state's post-conviction limitations periods governed "habeas petitions, not supplemental pleadings." *Id.* at 757, 138 P.3d at 457. The same logic applies here. Mr. Howard's original petition was timely, as it was based on *Hurst* and filed within a year of that decision. *See Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739–40 (2016) (concluding that one year is a "reasonable time" within which to raise a new claim after it becomes available), *vacated on other grounds*, --- U.S. ----, 137 S. Ct. 905 (2017) (per curiam). It follows under *Powell* that Claim Two cannot be kept out of the petition on a timeliness complaint. At a bare minimum, potential timeliness issues clearly do not render the claim futile, and provide no basis for denying leave to amend.

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[5] Chief Justice Strine wrote for himself and two other justices. Because five justices participated in *Rauf*, Chief Justice Strine's opinion represented the views of a three-judge majority of the court.

[6] If the Court finds the preceding discussion of the merits insufficient for purposes of evaluating Claim Two's futility, Mr. Howard directs it to the arguments in his Reply in Support of the Petition, filed March 27, 2017, which are addressed there to Claim One but which also apply to Claim Two. He incorporates the pleading here by reference.

The two remaining factors are bad faith and dilatory motives. *See Kantor*, 116 Nev. at 891, 8 P.3d at 828. Mr. Howard and his attorneys have demonstrated neither. They raised Claim Two as soon as their research into Claim One made them aware of it, and they have since been pursuing it as diligently as possible. *See* Ex. 4, at 2–3. Nor is the amendment designed to postpone an execution date, as the State has mistakenly claimed. *See* MTS, at 19. In federal court, Mr. Howard has not requested a stay for him to exhaust either Claim One or Claim Two, *see* Ex. 4, at 2, and it is the conclusion of those proceedings that would allow the State to set a meaningful execution date. *See McFarland v. Scott*, 512 U.S. 849, 858, 114 S. Ct. 2568, 2573 (1994) ("[A]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper." (second alteration in original) (internal quotation marks omitted)); *accord Lonchar v. Thomas*, 517 U.S. 314, 320, 116 S. Ct. 1293, 1297 (1996). Mr. Howard is in the middle of substantial litigation in federal court and submitted a major pleading there last week, all in the interest of reaching a disposition of his claims in both state and federal court as soon as he can. *See id.* The State's allegation of dilatory tactics is baseless and wrong.

Similarly, Mr. Howard did not act in bad faith by earlier filing the amended petition without securing leave in advance, as he reasonably believed that he was following local practice by doing so. *See* Oppo., at 5–6. And contrary to the State's unsupported suggestion to the contrary, *see id.* at 17–19, there is no basis for finding bad faith on the ground that undersigned counsel are engaged in some kind of conspiracy with other Federal Defender offices. The Idaho Capital Habeas Unit filed its petition and the amendment to protect their client's constitutional rights, and for no other reason. *See* Ex. 4, at 2–3. That other Federal Defender offices are also filing *Hurst* petitions reflects nothing more than the fact that they too have capital clients whose rights they are ethically required to protect. Frankly, it would be negligent for a capital defense attorney *not* to do everything they could to take advantage of such an important new case. *Hurst* is a "watershed ruling," *Powell*, 153 A.3d at 74, that has invalidated two states' capital statutes, *see supra* at 6, and led to numerous grants of relief. *See, e.g.*, Mark Berman, *Florida Supreme Court says hundreds of death row inmates may get new sentences and avoid executions*, Wash.

Post, Dec. 22, 2016, available at https://perma.cc/7YKH-2J4K[7] (noting that *Hurst* "could lead to resentencing for potentially more than 200 inmates, according to the Florida Supreme Court's estimate").

Reflecting the magnitude of the decision, *Hurst* arguments are being raised all around the country, by attorneys in Federal Defender offices, other public defenders, and private firms. *See, e.g.*, *Lambrix v. State*, --- So. 3d ----, 2017 WL 931105, at *8 (Fla. 2017) (dealing with a *Hurst* argument raised by a state public defender office); *McLaughlin v. Steele*, 173 F. Supp. 3d 855, 890–97 (E.D. Mo. 2016) (dealing with a *Hurst* argument raised by private attorneys); *State v. Mason*, --- N.E. 3d ----, 2016 WL 7626193, at *5–17 (Ohio App. 3d 2016) (same); *Powell*, 2016 WL 7243546, at *2–5 (same); *People v. Jackson*, 1 Cal. 5th 269, 374, 376 P.3d 528, 603–04 (2016) (same), *cert. denied*, --- U.S. ----, --- S. Ct. ----, 2017 WL 434228 (2017). The fact that multiple capital defense attorneys are seeking the benefit of a significant new precedent indicates that they are all doing their jobs, not that they are acting in bad faith.

Lastly, the State's erroneous claim otherwise notwithstanding, Mr. Howard cannot be denied leave to amend for bad faith or dilatory motives because he "wait[ed] to the last minute to file [his] *Hurst* complaint to the eve of the time bar." Ex. 2, at 4. His complaint was diligently pursued beginning in May 2016, *see* Ex. 4, at 2–3, and was filed on October 5, 2016, when undersigned counsel were finally approved by the federal court to handle the action and when the pro hac vice and local counsel issues were finally taken care of, *see id.*. That was more than three months before the time bar. *See Hurst*, 136 S. Ct. 616 (decided on January 12, 2016); *Rippo*, 132 Nev. Adv. Op. 11, 368 P.3d at 739–40 (concluding that one year is a "reasonable time" within which to raise a new claim after it becomes available). Claim Two was added when it was discovered by counsel. *See* Ex. 4, at 2–3. It was incorporated into an amended petition that was filed in accordance with this jurisdiction's well-established practice, *see supra* at 3, and

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[7] The website perma.cc allows the user to freeze a website for perpetuity in its present version with a constant address. Mr. Howard employs the service here to guarantee that the cited websites are not altered or destroyed during the litigation.

when it was struck this motion was filed as soon as a transcript became available for counsel to clarify the scope of the Court's ruling, *see id*. There has been no bad faith or attempt to delay.[8]

The final NRCP 15(a) factor is "prejudice to the opponent." *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 970 (2015). As discussed earlier, the amendment causes the State no disadvantage whatsoever. *See supra* at 4. It remains capable of responding to the claim, as it has already done at length. *See supra* at 4. Insofar as delay might be captured by the prejudice inquiry, any delay has been minimal. *See supra* at 4–5. Furthermore, most of the delay has been occasioned by the State's decision to abandon its well-established practice and file a completely unnecessary motion to strike. *See* Oppo. at 13–14.

Finally, it warrants mention that the State has contended that a motion for leave to amend must be justified with a showing of good cause. *See* MTS, at 16–22; MTS Reply at 14–16. The State's only authority for that notion is *Barnhart*, which uses the phrase "good cause" exactly one time, in the following passage:

> Although it is within the discretion of the district court to allow a petitioner to raise new issues at an evidentiary hearing, the district court should not resolve those issues without allowing the State the opportunity to respond. Should the district court find that there is *good cause* to allow a petitioner to expand the issues previously pleaded, the district court should do so explicitly on the record, enumerating the additional issues which are to be considered. Following the evidentiary hearing, the district court could allow petitioner and the State to file supplemental pleadings addressing the additional issues. At that point, the additional issues can be decided by the district court in the final order disposing of the petition and after such further proceedings as the district court may deem appropriate.

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[8] The State's attorney, Jonathan E. VanBoskerck, has repeatedly accused undersigned counsel of misconduct. *See, e.g.*, MTS, at 18–19; Mot. to Dismiss Fifth Pet. for Habeas Corpus, filed Nov. 2, 2016, at 20–21. As explained above and in Mr. Howard's earlier pleadings, *see* Oppo., at 12–18; Reply in Support of Pet., filed March 27, 2017, at 5–7, those remarks are entirely without foundation. If Mr. VanBoskerck continues to make unjustified accusations, undersigned counsel will have no choice but to begin weighing options for deterring him from that unfortunate path. They may consider at that time seeking his withdrawal from the case, moving for sanctions, and/or taking any other appropriate recourse. Undersigned counsel hope that such measures will prove unnecessary and that the State will begin focusing exclusively on the important legal issues presented in this capital case rather than on making unwarranted personal attacks on its opponents' attorneys.

122 Nev. at 303–04, 130 P.3d at 652 (emphasis added). By its plain terms, this paragraph deals entirely with a situation in which the petitioner attempts to "raise new issues at an evidentiary hearing." *Id.* As such, it is entirely inapposite here, where Mr. Howard has included the claim in an amended petition. *See id.*, at 303, 130 P.3d at 651 ("Generally, the only issues that should be considered by the district court at an evidentiary hearing on a post-conviction habeas petition are those *which have been pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond*." (emphasis added)). It makes sense that a petitioner asserting new claims at an evidentiary hearing would need to demonstrate good cause before injecting the claims into the proceeding at such a late date. *See id.*, at 304, 130 P.3d at 652 ("Counsel for petitioner provided no reason why [the new] claim *could not have been pleaded in the supplemental petition*." (emphasis added)). Mr. Howard acted far more quickly, and has submitted the new claim in a filed petition, giving the State the opportunity to engage with it. The good-cause obligation is, as a result, not implicated here.[9]

That proposition is consistent with federal law, which has been incorporated into state law on civil amendments. *See, e.g.*, *Nutton*, 131 Nev. Adv. Op. 34, 357 P.3d at 975 (relying on U.S. Supreme Court law while interpreting NRCP 15(a)); *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105–06, 507 P.2d 138, 139 (1973) (per curiam) (same). Federal amendments are governed by Federal Rule of Civil Procedure 15. That rule applies to federal habeas cases as well. *See Mayle*, 545 U.S. at 655, 125 S. Ct. at 2569. In the federal system, the amending party need only show good cause when a pretrial scheduling order has been entered, a circumstance not present or relevant here. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The federal rule is sensible and consistent with state law. It should be followed here, and no good-cause obligation should be imposed.

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[9] Good cause is referred to in *Powell* and *Miles*, but only in the context of the rules concerning Nevada's procedural bars. *See Powell*, 122 Nev. at 756, 138 P.3d at 456; *Miles*, 120 Nev. at 387 n.16, 91 P.3d at 590 n.16. Those bars can be addressed in a motion to dismiss, as proven by the State's invocation of the bars in its motion to dismiss the original petition. *See* MTD, at 13–23. The bars have no relevance to an analysis of whether leave to amend is merited, as the State has impliedly conceded. *See* MTS, at 19 n.9 ("The State does not address Petitioner's multiple procedural defaults in this motion since such a discussion is appropriate for an opposition and a motion to dismiss.").

In any event, if there is a good-cause requirement, it is satisfied. Undersigned counsel became aware of Claim Two while they were preparing their response to the State's motion to dismiss Claim One. *See* Ex. 4, at 3. After they became aware of it, they undertook more research and concluded that Claim Two represented a viable challenge to Mr. Howard's death sentence and that they therefore had an ethical obligation to their client to raise it. *See id.* Undersigned counsel then endeavored to determine how they were expected to submit an amended petition and ascertained—after looking at numerous district court dockets and consulting with local attorneys—that no leave was necessary. *See* Oppo., Ex. 1, at 2. At that point, they filed the amended petition. When the amended petition was struck, undersigned counsel became aware that the Court considered leave necessary, notwithstanding its own and the State's historical practice. They waited until the transcript of the Court's oral ruling was obtained, so as to confirm its precise scope and content, and they are now promptly seeking leave a day after securing the transcript.

This series of events is more than sufficient to establish good cause. In *Miles*, the Nevada Supreme Court reversed a district court for not allowing the prisoner to amend his petition approximately a year after it was filed to add a proper verification, since the inmate's signature on the original petition was not genuine. 120 Nev. at 387, 91 P.3d at 590. The signature issue came to light at an evidentiary hearing, when the State pointed it out and the prisoner acknowledged it. *Id.*, at 384, 91 P.3d at 588–89. If there is good cause to replace an inauthentic signature a year later when the prisoner knew of the defect the entire time, there is surely good cause to add an important new constitutional claim that a death row inmate's attorneys have discovered through ongoing legal research in a fast-evolving area of law. *See* Oppo. at 18–19 (explaining that "[t]he body of law that is springing up around *Hurst* is complex and evolving quickly").

Powell is to the same effect. There, the Nevada Supreme Court upheld a trial judge's ruling allowing the prisoner to supplement with a new claim more than two years after the original petition was filed. *See Powell*, 122 Nev. at 758, 138 P.3d at 458. In his original petition, Mr. Powell alleged that his attorneys "failed to conduct an adequate investigation to

discover and present all available mitigating evidence." *Id.*, at 756, 138 P.3d at 457 (internal quotation marks omitted). After that, "[v]arious attorneys filed a total of four supplemental pleadings on Powell's behalf in December 1998, July 1999, November 2000, and October 2001." *Id.*, at 754, 138 P.3d at 455. It was that final petition in which Mr. Powell first broached the new claim addressed by the Nevada Supreme Court, which asserted that trial counsel "should have called his brothers to testify in mitigation." *Id.*, at 757, 138 P.3d at 457. The *Powell* court agreed with the trial judge that supplementation was appropriate. *See id.*, at 758, 138 P.3d at 458. In a nutshell, *Powell* allowed supplementation to add a closely related claim more than two years later and after two intervening supplements. Amendment is even more proper here, where the claim was added two months after the original petition was filed, in the very first amended petition, and based on continual research into a complicated and fluid area of law.

This Court's orders in *McKenna* and *Walker* cut in favor of the same result. In both cases, *Hurst* supplementation was permitted. *See* Ex. 3; Ex. 5, at 1. And these were cases with far more extended timelines than the one at bar. The original petition in *McKenna* appears to have been submitted in October 2011, with the *Hurst* supplement offered on January 11, 2017. *See* Ex. 6, at 1, 4. In *Walker*, the original petition was filed on February 16, 2016, and the *Hurst* supplement not presented until January 9, 2017. *See*. Ex. 7, at 1, 2. A delay of more than five years in one case, and of almost a whole year in another, was not enough to preclude a new claim on precisely the same issue that Mr. Howard's amended petition addresses, and one that he raised within two months of his original petition, and on which leave to amend was formally requested within about six months. If this Court is demanding good cause, Mr. Howard can demonstrate it even more easily than the petitioners in *McKenna* and *Walker* and he too should be able to litigate his *Hurst* claims.

Simply put, the available authority strongly supports Mr. Howard's request for leave to amend.

Mr. Howard first filed his amended petition on December 1, 2016. He did so without seeking leave in advance based on undersigned counsel's good faith belief that no such leave was necessary. *See* Oppo., at 5–7. Therefore, if leave to amend is now granted, it would be

appropriate to enter the order nunc pro tunc to December 1, 2016. *See Mack v. Estate of Mack*, 125 Nev. 80, 92, 93, 206 P.3d 98, 106, 107 (2009) (reiterating that a district court enjoys the discretion to enter an order nunc pro tunc and that the purpose of such an order is to "make a record speak the truth concerning acts done" (internal quotation marks omitted)); *see also Energetiq Tech., Inc. v. ASML Netherlands B.V.*, 113 F. Supp. 3d 461, 465 (D. Mass. 2015) (granting leave to file an amended complaint nunc pro tunc to its filing date where the plaintiff mistakenly failed to seek leave in advance of the filing). Because Mr. Howard requests a nunc pro tunc order, the date on the amended petition that is attached to this motion is the same as the date it was originally filed. If the Court agrees that the amended petition should be filed but disagrees that its order should be nunc pro tunc, Mr. Howard would be happy to re-file the petition with today's date, or with the date of the order, as the Court sees fit.

To comply with the deadline set by the Court at the March 17 hearing, *see* Ex. 2, at 11, Mr. Howard filed a response to the State's opposition and motion to dismiss on March 27. However, the disposition of this motion will have a marked impact on the scope of the remaining litigation in the case. For in the event that Claim Two is permitted, the motion to dismiss will have to address it. In light of that dynamic, Mr. Howard believes it would be most appropriate for the Court to rule on the instant motion before holding a hearing on the State's motion to dismiss the original petition. Therefore, Mr. Howard would have no objection if the Court wished to rule on this motion in the absence of a hearing. Alternatively, the Court could schedule a single hearing to address both this motion and the State's motion to dismiss. At that hearing, if the Court allowed Mr. Howard to pursue Claim Two, it could also instruct the State to file a new motion to dismiss an amended petition that includes both Claim One and Claim Two.

DATED this 6th day of April 2017.

Respectfully submitted,

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Exhibit 1

(Amended Petition for Writ of Habeas Corpus)

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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

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

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: _____
Time of Hearing: _____

(Death Penalty Case)

AMENDED PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION]

Petitioner Samuel Howard hereby files this Amended Petition for Writ of Habeas Corpus pursuant to NRS 34.720 *et seq*. Mr. Howard alleges that his death sentence violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 8 of the Nevada Constitution because the Nevada Supreme Court improperly reweighed the aggravating evidence against the mitigating evidence on a post-conviction appeal instead of remanding his case to the trial court for a new sentencing before a jury, and because the jury did not find beyond a reasonable doubt that the aggravation outweighed the mitigation.

PROCEDURAL ALLEGATIONS

Mr. Howard is currently in the custody of the State of Nevada at the Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. The conviction and sentence were entered on September 16, 1983, in the Eighth Judicial District Court, Clark County, Nevada, by the Honorable John F. Mendoza, Case No. 81C053867. 2 ROA 349.[1] No execution date is scheduled.

Respondent Timothy Filson is the Warden of Ely State Prison. As such, he has custody of Mr. Howard. Respondent Adam Paul Laxalt is the Nevada Attorney General. The Respondents are sued in their official capacities.

On May 21, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 ROA 1–6. Mr. Howard was arrested in California and extradited to Las Vegas, Nevada in November of 1981. He entered his plea of not guilty on November 30, 1982. 1 ROA 17.

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[1] References to the record on appeal ("ROA") are to the ROA in Nevada Supreme Court case number 23386. Using the citation above as an example, "2" signifies the volume number and "349" the page number. Wherever possible, this petition will cite to documents already filed in state court challenges to Mr. Howard's conviction and sentence. *See* NRS 34.730(3)(a) ("If a petition challenges the validity of a conviction or sentence, it must be . . . [f]iled with the record of the original proceeding to which it relates . . . ."); EDCR 2.27(e) ("Copies of pleadings or other documents filed in the pending matter . . . shall not be attached as exhibits or made part of an appendix.").

On May 4, 1983, the jury found Mr. Howard guilty of all charges. 2 ROA 293. Following the penalty hearing on May 2–4, 1983, the jury returned a sentence of death on the first-degree murder charge. 2 ROA 294. On September 20, 1983, Mr. Howard was sentenced to fifteen years with a consecutive fifteen years for two counts of robbery with use of a deadly weapon. 2 ROA 349.

Mr. Howard testified at his trial.

After he appealed from the judgment of conviction and sentence, the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on December 15, 1986. *See Howard v. State*, 102 Nev. 572, 729 P.2d 1341 (1986).[2] On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr. Howard's petition for writ of certiorari on October 5, 1987. *See Howard v. Nevada*, 484 U.S. 872, 108 S. Ct. 203 (1987).

On October 28, 1987, Mr. Howard filed a petition for post-conviction relief in Clark County District Court.[3] An evidentiary hearing was held on the petition on August 25 and 26,

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[2] On direct appeal, Mr. Howard raised the following issues:

1. Whether he received effective assistance of counsel at trial;
2. Whether the trial court erred when it refused to sever Count I from Counts II and III of the indictment;
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements Mr. Howard made to law enforcement;
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Whether the trial court erred when it failed to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy.

The lists in this petition of claims raised in previous pleadings do not necessarily track the enumeration in earlier filings. Rather, the lists are intended to simplify and condense the claims for the convenience of the Court and of opposing counsel.

[3] In the petition, Mr. Howard raised the following ineffective-assistance-of-counsel claims:

1. Failure to present an insanity defense;
2. Failure to refute the State's evidence of Mr. Howard's future dangerousness;
3. Failure to object to prosecutorial misconduct;
4. Failure to argue the foregoing claims on direct appeal.

1988. *See* 3 ROA 491–568. The district court denied the petition on July 5, 1989, and on November 7, 1990, the Nevada Supreme Court affirmed. *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990). While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada in case number CV-N-88-264.[4] On June 23, 1988, the federal case was dismissed without prejudice. No evidentiary hearing was held in the case.

On May 2, 1991, Mr. Howard filed another federal habeas corpus petition in the same court in case number CV-N-91-196.[5] Mr. Howard's petition contained claims that had been presented in state court as well as claims that had not, and on October 16, 1991, the district court granted Mr. Howard's request to stay the case so that he could return to state court for exhaustion purposes. *See* 4 ROA 792–94.

In accordance with that order, Mr. Howard filed, on December 16, 1991, an amended petition for post-conviction relief in Clark County District Court.[6] *See* 4 ROA 786–90. Without

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[4] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel;
2. Failure to sever Count I of the indictment from Counts II and III;
3. Failure to grant an evidentiary hearing on the voluntariness of statements made by Mr. Howard to law enforcement;
4. Failure to instruct the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Failure to instruct the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Failure to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Failure to instruct the jury on sympathy and mercy;
8. Mr. Howard was legally insane at the time of the offense.

[5] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel at trial;
2. Ineffective assistance of counsel on direct appeal;
3. Cumulative error.

[6] In his final amended petition, Mr. Howard raised the following issues:

1. Prosecutorial misconduct;
2. Ineffective assistance of counsel at trial;
3. Speedy trial violation;
4. Cumulative error.

holding an evidentiary hearing, the court denied the petition on July 7, 1992. *See* 5 ROA 867–71. On March 19, 1993, the Nevada Supreme Court dismissed Mr. Howard's appeal. The U.S. Supreme Court denied certiorari on October 4, 1993. *See Howard v. Nevada*, 510 U.S. 840, 114 S. Ct. 122 (1993).

On January 12, 1994, the federal district court docketed a pro se petition for writ of habeas corpus submitted by Mr. Howard in case number CV-S-93-1209. After various procedural motions were adjudicated, Mr. Howard filed a second amended petition for writ of habeas corpus on January 27, 1997. The court entered an order on September 13, 2002, staying the proceeding so that Mr. Howard could exhaust in state court his federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for post-conviction relief in Clark County District Court. The court did not hold an evidentiary hearing and dismissed the petition on procedural grounds on October 23, 2003. On December 1, 2004, the Nevada Supreme Court affirmed the lower court's dismissal. *See Howard v. State*, No. 42593, 120 Nev. 1249, 131 P.3d 609 (2004) (per curiam) (table) (unpublished disposition). The federal district court lifted its stay on February 23, 2005, directing the Clerk to file Mr. Howard's Third Amended Petition for Writ of Habeas Corpus.

On October 25, 2007, Mr. Howard filed in Clark County District Court his fourth state petition for post-conviction relief.[7] In an order dated November 5, 2010, the state trial court

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[7] In his final amended petition, Mr. Howard raised the following issues:

1. The use of the felony-murder aggravator constituted double counting;
2. The use of the prior-felony aggravator was unlawful because Mr. Howard was never convicted of the earlier offense;
3. Trial counsel was ineffective;
4. The premeditation instruction was erroneous;
5. The first-degree murder statute was vague;
6. Unanimity from the jury was required on whether mitigation existed;
7. Prosecutorial misconduct;
8. Direct-appeal counsel was ineffective;
9. Appellate review was inadequate;
10. The Nevada death penalty is arbitrary and capricious;
11. Cumulative error.

denied the petition without holding an evidentiary hearing. The Nevada Supreme Court affirmed on July 30, 2014, though in so doing it declared void one of Mr. Howard's two aggravating circumstances. *See Howard v. State*, No. 57469, 2014 WL 3784121 (Nev. July 30, 2014) (per curiam) (unpublished disposition). On April 27, 2015, the U.S. Supreme Court declined to take certiorari review. *See Howard v. Nevada*, 135 S. Ct. 1898 (2015).

In Mr. Howard's federal habeas case, the district court denied relief on December 28, 2009. On August 10, 2015, the Ninth Circuit remanded the case to the district court for further proceedings. Litigation in district court is ongoing and no evidentiary hearing has yet been held.[8] Aside from this petition, the federal district court proceeding is the only action now pending that targets Mr. Howard's conviction and sentence.

The grounds for relief raised herein have not been previously presented to this or any other court. Mr. Howard did not present the claims earlier because they were not available until recently, as the claims are based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), which the U.S. Supreme Court handed down on January 12, 2016. By that date, Mr. Howard's prior state-court challenges to his conviction and sentence had already been fully disposed of. Consequently, the instant petition is the first opportunity that Mr. Howard has had to raise the claim.

This petition is being filed more than one year after the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on direct appeal. The delay was caused by the same factor noted above, i.e., the claims raised here rely on *Hurst*, and the *Hurst* opinion was not issued until January 12, 2016, more than twenty-nine years after the Nevada Supreme Court issued its opinion in Mr. Howard's direct appeal.

At trial, Mr. Howard was represented by Marcus Cooper and George Franzen. In his direct appeal, Mr. Howard was primarily represented by Lizzie R. Hatcher. Ms. Hatcher and

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[8] Mr. Howard's operative federal habeas petition raises twenty-five claims. *See* Ex. 1. Because of the volume of claims, Mr. Howard will not list each of them here and will instead refer to the recitation in the federal petition, which is attached as an exhibit, and incorporate that recitation by reference. *See id.* at 4–51; N.R.C.P. 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); NRS 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

John J. Graves both signed a motion to recall the remittitur that was filed with the Nevada Supreme Court in the direct appeal. A motion to extend the stay of the issuance of the remittitur was filed by Mr. Graves and Carmine J. Colucci. Messrs. Graves and Colucci submitted a petition for writ of certiorari to the U.S. Supreme Court in an effort to have that Court review the Nevada Supreme Court's decision in the direct appeal.

Mr. Howard has no sentences to serve after he completes the sentence imposed by the judgment under attack.

CLAIM ONE:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to a trial by jury and to have every fact exposing him to a harsher sentence proved by the State beyond a reasonable doubt. *See* U.S. Const. amends. V, VI & XIV; Nevada Const. art. I, secs. 3 & 8. In violation of these constitutional provisions, the Nevada Supreme Court in its July 30, 2014 decision struck one of Mr. Howard's two aggravating circumstances, reweighed the aggravating evidence against the mitigating evidence, and re-imposed a death sentence. Pursuant to U.S. Supreme Court precedent interpreting the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment, only a jury—and not a judge or judges—can find the facts permitting the imposition of a death sentence, and it must do so under a reasonable-doubt standard. *See Hurst*, 136 S. Ct. at 621–24. Such fact-finding includes the process of measuring mitigation against aggravation and determining whether a death sentence is warranted. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art. I, secs. 3 & 8. The Nevada Supreme Court therefore usurped the jury's constitutional role by reweighing the evidence and affirming Mr. Howard's death sentence without applying a reasonable-doubt standard. Now that one of two aggravators has been nullified by Nevada's highest court, Mr. Howard's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers.

The *Hurst* error identified above is structural, because stripping a capital jury of its constitutional fact-finding role at the penalty phase represents a defect affecting the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the Nevada Supreme Court not engaged in its unlawful reweighing of the mitigation against the aggravation, the court would instead have remanded for resentencing. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death based its determination on two aggravating circumstances: (1) that Mr. Howard had previously been convicted of a violent felony; and (2) that he committed the murder while robbing the victim. *See* 2 ROA 294. In 2014, on a post-conviction appeal, the Nevada Supreme Court nullified the second aggravating circumstance. *See Howard*, 2014 WL 3784121, at *6. However, the court upheld the remaining aggravator, which alleged a prior violent felony. *See id.* at *5. Having struck one aggravator and affirmed the other, the court reweighed the aggravating evidence against the mitigating evidence and determined that a death sentence was still appropriate, without employing a reasonable-doubt standard. *See id.* at *6. Accordingly, the Nevada Supreme Court affirmed the denial of post-conviction relief without remanding the case for a new penalty hearing. *See id.*

CLAIM TWO:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to have every fact exposing him to a harsher sentence proved to a jury beyond a reasonable doubt. *See* U.S. Const. amends. V, VI & XIV; Nevada Const. art. I, secs. 3 & 8. Such facts include those found by a jury when it weighs the aggravation against the mitigation and concludes that a death sentence is appropriate. Pursuant to *Hurst*, 136 S. Ct. at 621–24, the jury must find beyond a reasonable doubt that the aggravation outweighs the mitigation. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art.

I, secs. 3 & 8. At Mr. Howard's trial, the jury did not determine beyond a reasonable doubt that the aggravation outweighed the mitigation, rendering the death sentence unconstitutional.

The *Hurst* error identified above is structural, because depriving a defendant of a reasonable-doubt standard affects the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the jury been given the proper reasonable-doubt instruction, it would not have voted for death in light of the mitigating evidence presented at sentencing and the relative weakness of the aggravating evidence. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death was instructed that it could "impose a sentence of death only if it [found] . . . that there [were] no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." 2 ROA 281; *accord* NRS 175.554(3). For that weighing process, the jury was not given any standard of proof to apply. Therefore, when the jury selected a death sentence, it did not find that the State had proved beyond a reasonable doubt that the aggravation outweighed the mitigation.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Samuel Howard prays that the court issue a writ of habeas corpus and vacate his death sentence.

DATED this 1st day of December 2016.

Respectfully submitted,

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

PAOLA M. ARMENI, ESQ.
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FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ. (admitted *pro hac vice)*
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/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (admitted *pro hac vice*)
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

VERIFICATION

I, Jonah J. Horwitz, declare as follows:

1. I am an Assistant Federal Public Defender in the Capital Habeas Unit for the Federal Defender Services of Idaho. I represent Samuel Howard in his federal habeas corpus proceeding, *Howard v. Baker*, D. Nev., No. 2:93-cv-1209. On October 24, 2016, this Court filed an order admitting me to practice *pro hac vice* in Nevada in the instant case.
2. Petitioner is confined and restrained of his liberty at Ely State Prison in Ely, Nevada. I make this verification on Mr. Howard's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a state different from where my office is located. I have read this Amended Petition and know the contents to be true except as to those matters stated on information and belief and as to such matters I believe them to be true.
3. I verify that Mr. Howard personally authorized me to commence this action.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Assistant Federal Public Defender
Federal Defender Services of Idaho

CERTIFICATE OF SERVICE

I hereby certify that service of this Amended Petition for Writ of Habeas Corpus was made this 1st day of December 2016, by Electronic Filing to:

Jonathan E. VanBoskerck
Chief Deputy District Attorney
Office of the Clark County District Attorney
Jonathan.VanBoskerck@clarkcountyda.com

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

Exhibit 2

(Transcript of Hearing on Motion to Strike)

Electronically Filed
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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. SAMUEL HOWARD, aka, Keith, Defendant.	CASE NO. 81C053867 DEPT. XVII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 17, 2017

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
STATE'S MOTION TO STRIKE AMENDED FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

APPEARANCES:

For the State: JONATHAN VANBOSKERCK, ESQ.
Chief Deputy District Attorney

For the Defendant: DEBORAH CZUBA, ESQ.
(Appearing telephonically)
JONAH HORWITZ, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: CYNTHIA GEORGILAS, COURT RECORDER

LAS VEGAS, NEVADA, FRIDAY, MARCH 17, 2017

[Proceedings commenced at 9:33 a.m.]

THE COURT: Good morning, everyone. Have a seat.

MR. HORWITZ: Good morning, Your Honor.

MS. ARMENI: Good morning, Your Honor.

MR. VANBOSKERCK: Good morning.

THE COURT: Let me get my notes in line here.

MR. VANBOSKERCK: Judge, before you call the case, just your recorder has asked us once you call it to come up to the table there so the mic will pick us up. I just want to make sure that's okay with you.

THE COURT: Yes, absolutely.

MR. VANBOSKERCK: Thank you.

THE COURT: All right, State versus Howard. I have an argument on the writ, so why don't we have counsel come up and give us your appearances for the record, please.

And do we have court call on, Cynthia?

THE RECORDER: Yes, Judge.

THE COURT: Okay. And who is on the phone?

MS. CZUBA: Yes, Your Honor, this is Debra Czuba from the Federal Public Defender office.

THE COURT: All right.

Counsel.

MR. HORWITZ: Thank you, Your Honor. This is Jonah Horwitz also from the Federal Public Defender here on behalf of the Petitioner, Samuel Howard.

THE COURT: Okay.

MS. ARMENI: Good morning, Your Honor, Paola Armeni, acting as local counsel on behalf of Samuel Howard.

MR. VANBOSKERCK: Your Honor, Jonathan Vanboskerck for the State.

THE COURT: All right.

Okay, this is -- well, we have the petition and there's a motion to strike the amended fifth petition. So, who's arguing on behalf of the Defendant or on the Petitioner?

MR. HORWITZ: I am, Your Honor.

THE COURT: Okay. And so, State, you have a motion to strike the amended --

MR. VANBOSKERCK: Yes, Your Honor.

THE COURT: -- fifth petition.

MR. VANBOSKERCK: The amended fifth.

THE COURT: Go ahead.

MR. VANBOSKERCK: Judge, NRS 74.750(5) says you can't file a supplemental pleading without leave of the court. *Barnhart* tells us that leave of court means good cause, an explanation for the delay. In fact, in *Barnhart* they affirmed the denial of leave because Defense never gave an explanation for delay. But that's exactly what happened here. Four different branch offices of the FPD in 18 different capital habeas cases filed *Hurst* supplements without leave of court, without an explanation for the delay.

Recently in a new opinion the Nevada Supreme Court, in *Righetti* of the Eighth Judicial District Court, it's not in the pleadings because it's so new, this cite is 133 Nev. Adv. Op. 7, in a capital case said that, I'm quoting from page 10, less than forthright advocacy should not be rewarded and incentivized. But that's what really

is going to happen here if you don't strike the fifth -- the amended fifth petition.

What happened? The FPD saw a chance to delay execution of sentence by waiting to the last minute to file their *Hurst* complaint to the eve of the time bar. But to do that they violated *Barnhart* and the statute.

The concern for us, obviously, is that it's a delaying game. It's all about delay imposition of sentence as opposed to having a real issue and litigating it. You know I realize that I've kind of put you in a tough place because I've called them on their gamesmanship, and on one hand you have Mr. Howard facing a death sentence, and on the other hand you've got gamesmanship by the FPD. As a practical matter, what I'm really asking you to do is punish Mr. Howard because of the games his attorneys are playing.

Now, I stand by the pleading. I think it's appropriate. In fact, in *Larry Adams*, Judge Earley struck their *Hurst* pleading there on the basis of the violation of the statute. So, I think it's perfectly appropriate if they're going to try to gain the system and don't quite succeed, to let them face the time bar. But if you feel that my request is disproportionate in terms of the potential impact on Mr. Howard, I get that, I respect that. But what I would -- bottom line what I'd ask for, at the minimum, is a factual finding by this Court that the FPD as an organization -- 'cause I'm not looking for something stupid like a bar complaint, the FPD as an organization has engaged in bad faith or even less than forthright advocacy by trying to gain the system the way they did. The reason I'm asking for that is because the Federal Public Defender cannot come into state court and play games with our habeas cases. And the only way that's going to stop is a clear statement from our judiciary to the FPD that you have to play by the rules and play by rules in good faith.

So with that, unless the Court has any questions, we would submit on

the motion to strike.

THE COURT: No, I don't have any questions.

Counsel, you want to come so --

MR. HORWITZ: Sure.

THE COURT: -- you're picked up?

MR. HORWITZ: Absolutely.

MR. VANBOSKERCK: Would you like me to stay or go?

THE COURT: Oh, no that's fine. You can stay right there.

And, Counsel, I have a question. In your petition of October 5th, okay, the -- not the amended, in the petition --

MR. HORWITZ: Sure.

THE COURT: -- you do identify *Hurst*, okay, so why do we need the amended if you were obviously aware of the *Hurst* decision and you argued it in your petition of October 5th?

MR. HORWITZ: Right. Absolutely, Your Honor. We were aware of *Hurst*. The two claims are distinct. The first claim addresses the appellate reweighing that the Nevada Supreme Court undertook in 2014 in Mr. Howard's most recent post-conviction proceeding. The new claim addresses the jury's actual weighing of mitigation against aggravation. So those are distinct legal theories that we're asserting directed at different phases of the case.

Hurst I think it's a fast evolving area of law. It's led to a lot of new decisions from the state supreme courts. We cited a couple from Delaware and Florida which essentially invalidated those jurisdictions' death penalties. So it's an area of law that's fluid. I think new theories based on *Hurst* are emerging at a very fast pace. So that's essentially the explanation for why the second claim was added

shortly thereafter and it was only two months after the original petition was filed that we incorporated that claim.

THE COURT: Do -- and this -- maybe this would apply to both sides, how many more amendments do we have? No, I mean, at what point do we stop? And with due respect to state court, you know I think unfortunately we are more lenient than the federal court judges because when there's a deadline in federal court, at least in my experience from reading decisions and being a litigant, or you know an advocate for a party, there were hard and fast rules. The state court, depending on which department you're in, depending on what was the issue, you know rules are more guidelines it's just a concern that I have, and as best as I can on my cases, I'm sure its -- I'm not 100%. I try to you know let the word go out that I'm going to follow the rules in my courtroom. Now, if there's any comment by either side regarding my observation.

MR. HORWITZ: Sure. Just briefly, Your Honor.

We don't anticipate any further amendments at this time. We just wanted to make sure that Mr. Howard didn't lose the benefit of an important new constitutional decision from the US Supreme Court in the form of *Hurst* so we wanted to get our bases covered. I think claim 2 is very well grounded in the state Supreme Court decisions that you're seeing from other states. The Delaware Supreme Court and the Florida Supreme Court both extended *Hurst* to the jury's weighing against -- weighing of aggravation against mitigation and they both made *Hurst* retroactive, so we wanted to make sure that we were timely on that claim and that we were protecting Mr. Howard's interest. But we don't intend on filing anymore amendments at this time.

MR. VANBOSKERCK: And, Judge, just on that briefly. I mean I dispute

some of his interpretation of the law but I'll save that for the substantial argument, but assuming everything he said was true, both of those opinions, I think the Delaware Supreme Court's decision on -- where was that -- their initial decision in *Powell* was in December of 2016. Their decision that was retroactive was in August of 2016. And on remand in *Hurst*, the Florida Supreme Court decided theirs in October. So, all of those precedents predate or are contemporaneous with the filing of the fifth petition. So again, there's no explanation why they weren't included in the petition other than to create delay. And when you look at the global picture of them pulling the same stunt in 18 different cases involving four different offices, I can't see other -- any other explanation than an intent to intentionally delay our cases for the sake of frustrating execution of sentence.

MR. HORWITZ: Could I briefly respond to that, Your Honor?

THE COURT: Well, at this point -- I mean is there really anything new that you're bringing up? You're just saying some other state cases, state Supreme Court cases. I mean I'm going -- you know I'm going to look -- I read everything; okay? You know I'm going to look at the US Supreme Court and the Nevada State Supreme Court. That's what I think is authoritative on this issue.

MR. HORWITZ: Those are the cases that I think have brought these issues to our attention and those cases are evolving quickly. I think the mistake the State is committing is conflating his procedural default arguments that are directed at the petition itself with its arguments on the amendment. I think what the State is doing is setting a clock that began ticking with *Hurst* and saying that that's the delay that took place with respect to the amendment when that is not, in fact, the case. When courts consider a delay in seeking an amendment, they look at when the original petition was filed. That's really the timeline that's relevant to this issue that we're

here on today. And that timeline is two months so it's really not a substantial period of time. The arguments that the State can make about the delay from *Hurst* are arguments that it can raise in its motion to dismiss the amended petition.

THE COURT: I'm curious, what happens in federal court?

MR. HORWITZ: In federal court it's very well established that you have to seek leave to amend. All parties know that, which I think is a distinction with Clark County District Court, at least as far as our research led us to believe. It seemed like there was a practice of simply filing amended petitions which is why the -- that's the course we took. We would have been more than happy to file a motion for leave to amend if it seemed like that was the --

THE COURT: Well, a federal court judge sitting in Las Vegas would say its stricken; is that correct?

MR. HORWITZ: I think that's probably correct, Your Honor. I think if a party filed an amended petition without seeking leave in advance it would be stricken and that's why I tried to be as careful as I could in pursuing the amended petition. And my assumption going in was that I would need to file a motion for leave to amend, but when I looked at the cases and consulted local post-conviction attorneys, their view was all unanimously essentially that that's not what's done in Clark County. So, that's the reason that we filed this procedure. We had no -- there was no nefarious motive, contrary to what the State is suggesting. We would have been more than happy to file a motion for leave to amend.

MR. VANBOSKERCK: If I could just respond to that briefly?

THE COURT: Sure.

MR. VANBOSKERCK: Mr. Pescetta is the -- basically the team chief of the FPD's capital habeas litigation unit here in Las Vegas. In --

MS. CZUBA: That's not true, Your Honor. He's not the chief anymore.

MR. VANBOSKERCK: Okay, but he was at one point.

THE COURT: I'm going to have one person argue the motion and that is my rule and I stick to that rule.

Go ahead, Counsel.

MR. VANBOSKERCK: If I'm factually incorrect, Your Honor, I apologize. I would submit that he was at one point team chief, and in fact, is -- his name is well known as a habeas litigator here in Clark County for the Defense side.

In *Larry Adams*, two of those motions to strike on the basis of 34.750(5) were granted before they even filed their petition here. So, all they had to do was pick up the phone and talk to someone in their own office located here to hear that judges here were enforcing it.

MR. HORWITZ: Your Honor, could I --

MR. VANBOSKERCK: And --

MR. HORWITZ: I'm sorry.

THE COURT: Go ahead, sir.

MR. VANBOSKERCK: If I could just --

THE COURT: Sure go ahead.

MR. VANBOSKERCK: -- follow up on that briefly. As to the federal court concern, that's part of the concern here because like I pointed out in *Larry Adams*, Judge Earley has granted now three of these. Well, in their opposition they point out or they try to argue that if we're not being consistent in applying these things federal court will then say it doesn't count just like they did per 34.810. Well, if the rule applies and you don't apply it, you're essentially creating the argument for federal court that that Nevada statute has no force and that's something this Court should

not do.

THE COURT: Okay. I -- like I said, this Court, Department 17, endeavors to file the deadlines whether civil or criminal cases. I've stricken experts in civil cases. I've stricken pleadings. And, Counsel, you practice in federal court. You know that deadlines are deadlines. And so, I am granting the motion to strike the amendment --

MR. HORWITZ: Could I just say --

THE COURT: -- to the fifth --

MR. HORWITZ: -- something very quickly?

THE COURT: -- petition. I ruled, Counsel.

MR. HORWITZ: Okay.

THE COURT: Okay.

All right, let's get to the heart of what we have now. All right, it's your petition.

MR. HORWITZ: Okay.

So, Your Honor, you'd like me to make an argument on the merits of our -- the one --

THE COURT: Oh, yeah, absolutely.

MR. HORWITZ: -- claim in the original --

THE COURT: Right.

MR. HORWITZ: -- petition? Okay.

Our claim essentially, Your Honor, is that the Nevada Supreme Court violated the Sixth Amendment when it engaged in appellate reweighing on the fourth post-conviction petition that Mr. Howard brought. What the Nevada Supreme Court did was to strike one of the two aggravators in Mr. Howard's case. It struck the

aggravator that was based on the commission or robbery during the commission of murder. The Nevada Supreme Court often refers that to a -- refers to that as a *McConnell* aggravator. So the *McConnell* aggravator was struck. The Nevada Supreme Court then weighed the mitigation against the remaining aggravator, which was an aggravator based on a prior conviction of a violent felony, and it said that in its independent judgment the aggravations still outweigh the mitigation and that still merited a death sentence.

We think under the plain language of *Hurst* that that is now unconstitutional. What *Hurst* said was that anything that exposes a Defendant to a higher sentence, to a potential death sentence is a fact that must be considered by the jury. And that is now the law of the land. That is the ultimate statement on what the Sixth Amendment means. We think what the Nevada Supreme Court did here clearly ran afoul of that rule from *Hurst*.

THE COURT: Well, the jury found both -- I mean the Supreme Court vacated or struck one of the aggravators, but the jury found the other aggravator and imposed the imposition of death.

MR. HORWITZ: It did. It did, Your Honor. But the jury never had an opportunity to weigh the mitigation against the, what is now the only valid aggravator, which is the prior violent felony aggravator. So that is an opportunity that the jury is entitled to take under the Sixth Amendment. It's a finding that the jury is required to make under the Sixth Amendment.

THE COURT: And the argument by the State is that the *Hurst* issue is really -- follows the *Ring* decision from '02 and that the clock should have started ticking in '02; if you can address that.

MR. HORWITZ: Sure. Absolutely.

We disagree with that theory. We think *Ring* addressed a different set of circumstances. It addressed a much clearer cut distinction between the judge and the jury in Arizona which was the regimen that was at issue in *Ring*. The jury -- the judge essentially handled the entire sentencing, so the *Ring* decision invalidated a capital statute that was drafted in that sort of fashion.

What *Hurst* did was extend *Ring* to a situation in which the jury is still involved in the sentencing. It's just not involved sufficiently. It's not making all of the fact finding that it's required to make. And that's, I think, where the Delaware and Florida Supreme Court decisions come in because that's exactly what they say that *Ring* hadn't made this aspect of the Sixth Amendment clear and that *Hurst* broadened the ruling and applied it across the board to judicial involvement in the capital sentencings.

THE COURT: And are you asking me to basically overrule the Nevada Supreme Court you know after they struck one of the aggravators and then let the death penalty stand? I mean am I -- are you putting me in a position to overrule the Nevada Supreme Court?

MR. HORWITZ: I wouldn't put it quite like that, Your Honor. I think the Nevada Supreme Court, when it ruled in 2014 in Mr. Howard's case, it didn't have the benefit of *Hurst* which was decided in January of 2016. So I think the ruling that we would ask this Court to make is that the Nevada Supreme Court's prior approach to appellate reweighing in capital cases was legitimate at the time under US Supreme Court of law in 2014 when it did it. It's just been abrogated by the US Supreme Court and it's now unconstitutional. I think that was exactly the case in other states, the Ohio Supreme Court decision that we mentioned in -- I'm sorry, we haven't had an opportunity to file a response to the motion to dismiss yet. And just

by the way, Your Honor, we would appreciate the opportunity to do that before any ruling is rendered since we were -- we were proceeding on the assumption that we would get a chance to file a formal pleading in response to the motion to dismiss. But the higher Supreme Court has extended *Hurst* to appellate reweighing in exactly the way that we think it ought to be extended. In the Ohio Supreme Court, like the Nevada Supreme Court, prior to *Hurst*, was operating on the assumption that it could engage in appellate reweighing in capital cases. We think that's no longer the case and that it's now unlawful.

THE COURT: And is your position that the standard of Nevada should be that the aggravators outweigh beyond a reasonable doubt the mitigators or is that still part of the claims here?

MR. HORWITZ: Well, that was, I think, more essential to claim 2. I would say it's still the claim that was struck from the petition. I would say that it's still -- I think that it is still an issue in claim 1. I think they're closely related. And the jurisdiction's like Florida and Delaware that have extended *Hurst* have -- at least there is some language in those opinions to suggest that it is a -- with the extension of *Hurst* there is now a reasonable doubt requirement that has been imposed on that weighing process. So, I would agree with that, Your Honor.

THE COURT: All right.

MR. HORWITZ: And I would also say just on a side note, we would I think -- if the motion to strike was granted on the basis that we didn't seek leave in advance of filing the amended petition, we would ask for an opportunity to file a formal motion seeking leave to add the second claim.

THE COURT: All right. Thank you.

Anything else? I didn't want to cut you off.

MR. HORWITZ: Oh, no, no, --

THE COURT: Anything else?

MR. HORWITZ: -- no, no, Your Honor.

THE COURT: All right.

All right, go ahead, Counsel.

MR. VANBOSKERCK: Judge, just procedurally, since they've indicated -- and honestly I don't recall that they did not get an opportunity to reply to the opposition but to the motion to dismiss, if Your Honor would like to rule today I would have no objection to withdrawing the -- this motion to dismiss part, or rather the motion to dismiss part and just standing on the opposition. I think you can consider the procedural bar in the context of either or both.

But regardless, even if everything Defense counsel just said is right, this claim is independent and procedurally barred because the Nevada Supreme Court weighed in 2014 *Hurst* is absolutely clear that they are applying *Ring*. That's the extent of *Hurst*. They say in their conclusion to the same extent that Timothy Ring was entitled -- I'm sorry, I can't remember the quote, but they essentially equate their ruling with the same ruling in *Ring*. I gave you the quote in the opposition. So, if *Hurst* is an application of *Ring*, *Ring* is 2002, reweighing happens in 2014. So even if they're absolutely right, it's still independently barred because they should have come in in 2015 with this claim on the basis of *Ring* and the reweighing.

But the bottom line is they're not right here. *Hurst* is abundantly clear that it is simply applying *Ring*. Anecdotally, just recently, and it didn't make it into our pleadings because I don't believe it had been published prior to our pleadings, but the Nevada -- excuse me, the California Supreme Court recently ruled that *Hurst* did

not apply retroactively essentially saying *Hurst* is equivalent to *Ring*. That went up on a cert petition to the US Supreme Court and they denied it. So, if *Hurst* really was as broad as they're saying, the US Supreme Court should have granted cert in that position to make it clear to the California Supreme Court. And if the Court would like the cite I can get it to you later. I don't have it off the top of my head.

But also if you look at the structure of *Hurst* itself, the way they dealt with their precedent inside of *Hurst* suggests that they're only looking at the aggravators. They cite to *Walton* and they overrule two cases in *Hurst*. And they're very clear when they're overruling. They're only overruling as to the aggravating circumstances. They don't overrule *Walton* and in *Walton* they specifically say that states can require the Defendant to prove mitigation. So if they were to try to impose this new burden that the jury had to find that mitigation outweighed aggravator beyond a reasonable doubt, they should have overruled *Walton* just like they did with other cases in *Ring*.

But bottom line, Judge, you're initial instinct here was absolutely right. They are asking you to overrule the Nevada Supreme Court. *Nunnery* is abundantly clear. *Nunnery* addressed *Ring*. *Lyle* addressed *Ring*. And every time it's gone up to our court, our court says, no, *Ring* doesn't apply to the weighing component, the selection phase. That's the law of the land in Nevada. If anyone is going to overrule that it has to be the Nevada Supreme Court. So even if they're 100% right, you still need to deny on the basis of Nevada precedent and let them take it to the Nevada Supreme Court.

With that, -- excuse me, sorry, my allergies -- I would --

THE COURT: Wasn't this my -- wasn't my court involved in the last round of *Lyle*?

MR. VANBOSKERCK: I honestly don't know, Judge.

THE COURT: I mean there's been numerous rounds. I think --

MR. VANBOSKERCK: I don't remember. I apologize.

THE COURT: Okay.

Anything further, Counsel?

MR. HORWITZ: Yeah, just briefly, Your Honor.

All right, with respect to the State's position that the Court can rule on the merits of the petition right now, I think these are serious constitutional claims that are being raised now. I think they're complicated issues. I think both parties and the Court would benefit if Mr. Howard were given an opportunity to file a formal opposition in some form to the State's motion to dismiss where we could brief this in more detail.

To the State's assertion that the Supreme Court's denial of cert in the California case is significant, I would strongly disagree. I think it's very well established that the US Supreme Court has a series of criteria that it considers in deciding whether to grant cert and it often will go years and years without clarifying an area of law and then overrule its own precedent which in fact is exactly what it did in *Hurst*. So, I think an argument like that is tantamount to saying the US Supreme Court's refusal to reconsider the Florida regimen in light of *Ring* and its other sixth amendment cases that that shows that the Florida system was legally correct which is plainly not the case.

And again on the overruling point, I think that the State is mischaracterizing this issue by saying that we are asking the Court to overrule *Nunnery* and *Lyle*. Our position is that *Hurst* overruled those cases. The US Supreme Court obviously is the final authority on the meaning of the Sixth

Amendment. *Nunnery* and *Lyle* were both decided before *Hurst* came down. So we think if a higher court has abrogated those decisions its incumbent on any court to acknowledge that fact that those cases are no longer good law.

Does the Court have any questions?

THE COURT: No, no, I do not.

MR. HORWITZ: Okay. Thank you.

THE COURT: I just want to make sure I have all the pleadings here.

[Colloquy between Court and law clerk]

THE COURT: Okay, State, I just want to make sure I understood on -- there's a motion to dismiss. What would be your position on giving them an opportunity to respond? Because I'm trying to get all the pleadings because we have a set of pleadings to strike; as you know we dealt with that. And so we had the petition. We have the opposition and motion to dismiss. And then I don't have another pleading from the -- from Mr. Howard. I'm trying to keep all these straight; pardon me.

MR. VANBOSKERCK: Yeah, these things tend to grow.

Number one, again, if the Court wants to rule, I'm happy to withdraw the motion to dismiss part and just go on the opposition. However, I think you could not dismiss and rule on this. There's a specific district court rule on point. I think its district court Rule 13 that sets out the time frames for replies and oppositions and they're outside that time frame. So, I think you could legitimately rule since they haven't filed within the time frame. I think its 7 or 10 days or what not. However, if you want to let them, I have no objection. I'll submit it to the Court, but I do think you're in a position where you could rule because you rightly pointed out really the arguments are there. We've all put out the core of our thoughts. I mean, yes, maybe we could put in a few citations, different -- make a few additional arguments, but the

essence of what we're arguing is not going to change.

THE COURT: I'm going to give the -- Mr. Howard an opportunity to file a responsive pleading. Have that submitted 10 days from today. The State will have 10 days thereafter. And then it will be on chambers calendar.

[Colloquy between Court and clerk]

THE COURT: I put it on my chambers calendar. It's more of a tickler system. No one shows up for the chambers calendar. It just forces me to know I have a decision to make and get the decision out, so.

THE CLERK: So then two weeks for your calendar [indiscernible]?

THE COURT: Yes.

THE CLERK: Okay, so I have March 27th; thereafter April 7th and then two weeks after April 7th --

THE COURT: And that would be a Wednesday.

THE CLERK: You want it on a Wednesday?

THE COURT: Yeah.

THE CLERK: It would be the 19th of April, chambers calendar.

MR. VANBOSKERCK: Thank you, Your Honor,

THE COURT: All right. And you need to have timely filings. If not, I will not consider it.

Thank you, Counsel. Have a great weekend.

MR. VANBOSKERCK: You too, Your Honor.

MR. HORWITZ: Thank you, Your Honor.

MS. ARMENI: Thank you.

THE COURT: Thank you.

THE RECORDER: Thank you, Ms. Czuba.

MS. CZUBA: Thank you.

[Proceedings concluded at 10:02 a.m.]

* * * * *

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

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

Exhibit 3

(Order Granting Leave to File *Hurst* Supplement in *McKenna*)

Electronically Filed
03/01/2017 01:42:48 PM

CLERK OF THE COURT

ORDR

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

Patrick Charles McKenna, Petitioner, vs. Renee Baker, Warden, et al., Respondents.	Case No. C044366 Dept. No. VI (Death-Penalty Habeas Corpus Case)

ORDER

On January 11, 2017, Petitioner McKenna moved this Court, pursuant to NRS 34.750(5), for leave to file a supplement to his petition for a writ of habeas corpus in order to bring a new claim based upon the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The State filed an Opposition to Petitioner's Motion for Leave to Supplement on January 19, 2017, as well as a Motion to Strike Fugitive Supplement. Petitioner then filed a Reply in support of the Motion for Leave to Supplement and an Opposition to the Motion to Strike, and the State filed a Reply in support of the Motion to Strike.

Having considered all of the pleadings and the arguments presented by counsel at the hearing before the Court, the Court concludes that Petitioner

McKenna has shown good cause to supplement his petition with the new claim. Accordingly,

IT IS HEREBY ORDERED that Petitioner's Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) is GRANTED and Respondent's Motion to Strike Fugitive Supplement is DENIED.

DATED this 9th day of February, 2017.

DISTRICT COURT JUDGE

Submitted by:
Jon M. Sands
Federal Public Defender
District of Arizona

By:
Karen S. Smith (IL Bar No. 6300905)
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
karen_smith@fd.org

Exhibit 4

(Declaration of Jonah Horwitz)

DECL
GENTILE CRISTALLI
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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII Date of Hearing: Time of Hearing: (Death Penalty Case)

DECLARATION IN SUPPORT OF MOTION TO AMEND OR SUPPLEMENT

Jonah J. Horwitz declares as follows under the penalty of perjury:

1. In the above-captioned case, I am counsel for Petitioner Samuel Howard, along with Deborah Anne Czuba and Paola M. Armeni. Ms. Czuba and I also represent Mr. Howard in his federal habeas case, *Howard v. Filson*, D. Nev. No. 2:93-cv-1209.
2. In the federal habeas case, we have not requested a stay for the pendency of this post-conviction action. Instead, we are actively litigating in federal court. On March 31, 2017, we filed a major new pleading on various ineffectiveness issues that challenges both Mr. Howard's conviction and his death sentence. It is 176 pages and supported by fifty-three exhibits.
3. Litigating this case simultaneously with the federal case has created a considerable amount of additional labor for myself and Ms. Czuba. However, we have no qualms in taking on the extra work because we would like for Mr. Howard's constitutional rights to be vindicated as expeditiously as possible.
4. I conceived of the idea for this post-conviction action around May 5, 2016, having studied and reflected upon *Hurst v. Florida*, 136 S. Ct. 616 (2016), and lower court opinions interpreting that decision. The idea for our *Hurst* petition came from that process, and not from any other Federal Defender office. Once the idea had been hatched, Ms. Czuba and I discussed whether the issue was worth litigating.
5. Having decided that it was, we had to ascertain whether permission from the federal court was necessary in order to pursue the claim in state court. We answered that question too in the affirmative, and sent the federal judge a letter, on July 28, 2016, seeking authorization to return to state court. Permission was granted on September 13, 2016.
6. After that, we immediately began the process of finding local counsel, gathering the materials for our pro hac vice applications, and then submitting those materials to the Nevada Bar. As soon as the bar provided the requisite statement, we filed Mr. Howard's petition.
7. In deciding to file a *Hurst* petition, we were concerned only about the rights of our client, Samuel Howard, and not about any other death row inmates represented by

any other Federal Defender offices. The timing of our *Hurst* petition was not based on discussions with other Federal Defender offices. Our petition was filed on October 4, 2016 because that is when we had gathered all of the necessary materials and finalized the initial pleadings.

8. I became aware of Claim Two while I was preparing our response to the State's motion to dismiss Claim One. After I became aware of it, I undertook more research and concluded that Claim Two represented a viable challenge to Mr. Howard's death sentence and that I therefore had an ethical obligation to raise it.

DATED this 5th day of April 2017.

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (*pro hac vice)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

Exhibit 5

(Feb. 13, 2017 Minutes From *Walker*)

REGISTER OF ACTIONS
CASE NO. 03C196420-1

The State of Nevada vs James R Walker

§ Case Type: **Felony/Gross Misdemeanor**
§ Date Filed: **11/06/2003**
§ Location: **Department 21**
§ Cross-Reference Case Number: **C196420**
§ Defendant's Scope ID #: **224426**
§ Lower Court Case # Root: **03F14763**
§ Lower Court Case Number: **03F14763A**
§ Supreme Court No.: **62838**
§
§

RELATED CASE INFORMATION

Related Cases
03C196420-2 (Multi-Defendant Case)

PARTY INFORMATION

Defendant	**Walker, James R**	**Lead Attorneys** **Bret O Whipple** *Retained* 702-731-0000(W)
Plaintiff	**State of Nevada**	**Steven B Wolfson** 702-671-2700(W)

CHARGE INFORMATION

Charges: Walker, James R	**Statute**	**Level**	**Date**
1. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
1. ROBBERY	200.380	Felony	01/01/1900
2. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. BURGLARY.	205.060	Felony	01/01/1900
3. ROBBERY	200.380	Felony	01/01/1900
3. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
4. TAKING PROPERTY FROM PERSON OF ANOTHER UNDER CIRCUMSTANCES NOT AMOUNTING	205.270	Felony	01/01/1900
4. MURDER.	200.010	Felony	01/01/1900
4. DEGREES OF MURDER	200.030	Felony	01/01/1900
4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
5. ROBBERY	200.380	Felony	01/01/1900
5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. ATTEMPT.	193.330	Felony	01/01/1900
6. MURDER.	200.010	Felony	01/01/1900
6. DEGREES OF MURDER	200.030	Felony	01/01/1900
6. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
7. HABITUAL CRIMINAL	207.010	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

02/13/2017 **All Pending Motions** (3:00 AM) (Judicial Officer Adair, Valerie)

Minutes
02/13/2017 3:00 AM
- PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENT...STATE'S MOTION TO STRIKE FUGITIVE SUPPLEMENT Court GRANTED Petitioner's Motion. The State's Supplemental Return is due no later than 3/31/17. Deft's Opposition to Motion to Dismiss due 4/14/17. Hearing SET. 4/18/17 9:30 AM HEARING CLERK'S NOTE: Minute order updated to reflect agreed upon briefing and hearing dates. jmc 2/22/17

Exhibit 6

(*McKenna* Docket)

10/05/2011 **Exhibits**
Exhibits to Peitition for Writ of Habeas Corpus

10/05/2011 **Petition**
Petition for Writ of Habeas Corpus

10/06/2011 **Certificate of Mailing**
Certificate of Mailing

10/06/2011 **Exhibits**
Manually Filed Exhibits to Petition for Writ of Habeas Corpus

11/17/2011 **Stipulation and Order**

06/04/2012 **Petition for Writ of Habeas Corpus** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
Parties Present
Minutes
11/21/2011 Reset by Court to 05/28/2012
05/28/2012 Reset by Court to 06/04/2012
01/07/2013 Reset by Court to 04/29/2013
04/29/2013 Reset by Court to 03/31/2014
Result: Continued

06/06/2012 **Recorders Transcript of Hearing**
Recorder's Transcript of Proceeding: Defendant's Petition for Writ of Habeas Corpus - June 4, 2012

10/02/2012 **Motion to Associate Counsel**
Defendant's Motion to Associate Counsel

10/15/2012 **Motion to Associate Counsel** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
10/15/2012, 03/20/2013
Defendant's Motion to Associate Counsel
Parties Present
Minutes
03/18/2013 Reset by Court to 03/20/2013
Result: Off Calendar

10/23/2012 **Motion for Substitution**
Motion For Substitution Of Counsel

10/24/2012 **Opposition to Motion**
Opposition to Motion for Substitution of Counsel

11/05/2012 **Reply to Opposition**
Reply To Opposition To Motion For Substitution Of Counsel

11/19/2012 **Notice**
Notice Of Supplemental Authority Regarding Motion For Substitution Of Counsel

01/08/2013 **Response**
State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)

03/07/2013 **Notice of Hearing**
Notice of Hearing on Motion to Associate Counsel

03/07/2013 **Notice of Hearing**
Notice of Hearing on Motion for Substitution

03/12/2013 **Notice**
Renotice of Hearing

03/20/2013 **Hearing** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
HEARING: DEFT'S MOTION FOR SUBSTITUTION
03/18/2013 Reset by Court to 03/20/2013
Result: Granted

03/20/2013 **All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
Parties Present
Minutes
Result: Matter Heard

03/20/2013 **Recorders Transcript of Hearing**
Recorder's Transcript of Proceeding: Defendant's Motion to Associate Counsel and Defendant's Motion for Substitution, March 20, 2013

04/15/2013 **Order**

04/24/2013 **Status Check** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
STATUS CHECK: BRIEFING
Parties Present
Minutes
Result: Matter Heard

04/29/2013 *CANCELED* **Argument** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
Vacated - per Judge

01/07/2013 Reset by Court to 04/29/2013

04/29/2013 **Recorders Transcript of Hearing**
Recorder's Transcript of Hearing: Status Check: Briefing, April 24, 2013

08/29/2013 **Ex Parte**
Ex Parte Application for Order Waiving Fees Pursuant to Nevada Supreme Court Rule 42 (3)(e) and Renewal of Application Fees Under Rule 49 (9); Exhibits

09/06/2013 **Stipulation and Order**
Stipulation for Extension of Time and Order

01/21/2014 **Amended Petition**
Amended Petition for Writ of Habeas Corpus

01/21/2014 **Exhibits**
Exhibit List to Amended Petition for Writ of Habeas Corpus

01/21/2014 **Exhibits**
Exhibit List to Amended Petition for Writ of Habeas Corpus

01/21/2014 **Exhibits**
Exhibit List; Exhibits 186-193

01/21/2014 **Exhibits**
Exhibit List to Amended Petition for Writ of Habeas Corpus

01/21/2014 **Exhibits**
Exhibit List to Amended Petition for Writ of Habeas Corpus

01/22/2014 **Exhibits**
Exhibit List to Amended Petition for Writ of Habeas Corpus

01/28/2014 **Errata**
Erratta to Paragraph 54 of McKenna's Amended Habeas Petition

02/11/2014 **Supplemental**
Supplemental Exhibits in Support of Amended Habeas Petition

03/31/2014 *CANCELED* **Argument** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
Vacated - per Stipulation and Order
Argument: Deft's Petition For Writ Of Habeas Corpus

04/04/2014 **Supplement**
Correction to Exhibit 277 to the Amended Petition for Writ of Habeas Corpus

04/21/2014 **Response**
Motion to Dismiss Defendant's Amended Petition for Writ of Habeas Corpus (Post-Conviction)

04/28/2014 **Motion to Dismiss**
Motion to Dismiss Defendant's Amended petition for Writ of Habeas Corpus (Post-Conviction) Logged in and handed to Will.

06/03/2014 **Exhibits**
Supplemental Exhibits in Support of the Amended Habeas Petition

06/05/2014 **Opposition to Motion to Dismiss**
Opposition to Motion to Dismiss

06/06/2014 **Motion**
Notice of Motion and Motion to Strike Exhibit 295

06/10/2014 **Reply**
Reply to Opposition to Motion to Dismiss Defendant's Amended Petition for Writ of Habeas Corpus (Post-Conviction)

06/13/2014 **Response**
Response to Respondent's Motion to Strike Exhibit 295

07/14/2014 **Argument** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
07/14/2014, 09/10/2014

06/30/2014 Reset by Court to 07/14/2014

Result: Matter Heard

07/14/2014 **Motion** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
Notice of Motion and Motion to Strike Exhibit 295

06/30/2014 Reset by Court to 07/14/2014

Result: Denied

07/14/2014 **All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.)

Parties Present

Minutes

Result: Matter Heard

07/17/2014 **Recorders Transcript of Hearing**
Recorder's Transcript of Proceedings Motion to Strick Exhibit 295, Argument July 14, 2014

08/04/2014 **Motion**
Notice of Motion and Motion to Clarify Scope of Evidentiary Hearing

08/07/2014 **Motion to Strike**
Motion to Strike Respondents' Motion to Clarify Scope of Evidentiary Hearing

08/07/2014 **Opposition to Motion**
Opposition to Motion to Strike Motion to Clarify Scope of Evidentiary Hearing

09/10/2014 **Status Check** (8:30 AM) (Judicial Officer Cadish, Elissa F.)

	09/10/2014, 11/06/2014 *Status Check: Discovery/Schedulilng of Evidentiary Hearing*
09/10/2014	**Motion to Clarify** (8:30 AM) (Judicial Officer Cadish, Elissa F.) **09/10/2014, 11/06/2014** *States' Notice of Motion and Motion to Clarify Scope of Evidentiary Hearing*
09/10/2014	**Motion to Strike** (8:30 AM) (Judicial Officer Cadish, Elissa F.) *Motion to Strike Respondents' Motion to Clarify Scope of Evidentiary Hearing*
09/10/2014	**All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.) Parties Present Minutes Result: Matter Heard
09/12/2014	**Order** *Application and Order for Transcripts*
09/16/2014	**Recorders Transcript of Hearing** *Recorder's Transcript of Hearing: State's Motion to Clarify Scope of Evidentiary Hearing and Argument: Defendant's Motion to Strike Respondent's Motion to Clarify Scope of Evidentiary Hearing, State's Mottion to Clarify Scope of Evidentiary Hearing September 10, 2014*
10/01/2014	**Response** *Response to Respondents' Motion to Clarify*
10/14/2014	**Reply** *Reply to Response to Motion to Clarify Scope of Evidentiary Hearing*
11/06/2014	**All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.) Parties Present Minutes Result: Matter Heard
11/19/2014	**Order** *Application and Order for Transcripts.*
11/24/2014	**Recorders Transcript of Hearing** *Recorder's Transcript of Proceedings: Status Check Discovery/Scheduling of Evidentiary Hearing/Argument, State's Motion to Clarify Scope of Evidentiary Hearing, November 6, 2014*
12/12/2014	**Substitution of Attorney** *Notice of Substitution of Counsel*
01/12/2015	**Status Check** (8:30 AM) (Judicial Officer Cadish, Elissa F.) **01/12/2015, 03/16/2015, 05/18/2015, 07/20/2015, 01/20/2016, 05/04/2016** *Re: Evidentiary Hearing* Parties Present Minutes Result: Continued
03/04/2015	**Motion** *Motion for Telephonic Appearance at Status Conference March 16, 2015*
03/05/2015	**Document Filed** *Proposed Order for Evidentiary Hearing*
03/05/2015	**Motion to Associate Counsel** *Motion to Associate Counsel*
03/16/2015	**Motion to Associate Counsel** (8:30 AM) (Judicial Officer Cadish, Elissa F.) *Defendant's Motion to Associate Counsel* Result: Granted
03/16/2015	**All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.) Parties Present Minutes Result: Matter Heard
03/18/2015	**Application** *Application for Waiver of Fee Pursuant to Nevada Supreme Court Rule 42(3)(e)*
04/01/2015	**Order** *Order for Evidentiary Hearing*
04/01/2015	**Order** *Order*
11/13/2015	**Notice** *Notice of Withdrawal of Counsel*
07/06/2016	**Brief** *Supplemental Brief on the Kazalyn Instructional Error*
08/04/2016	**Opposition**

	Opposition to Supplemental Brief Regarding Kazalyn Instruction
08/05/2016	**Notice** *Notice of Intent to File Reply to Opposition to Supplemental Brief on the Kazalyn Instruction*
09/19/2016	**Motion to Associate Counsel** *Petitioner's Motion to Associate Counsel*
09/19/2016	**Notice of Withdrawal** *Notice of Withdrawal of Counsel*
09/21/2016	**Application** *Application for Waiver of Fee Pursuant to Nevada Supreme Court Rule 42(3)(e)*
09/21/2016	**Application** *Application For Waiver Of Fee Pursuant To Nevada Supreme Court Rule 42 (3) (e)*
09/29/2016	**Stipulation and Order** *Stipulation to Extend Time for Reply Brief, to Reschedule Hearing, and Order*
10/03/2016	**Supplemental** *Supplemental Authorities in Support of Opposition to Supplemental Brief Regarding Kazalyn Instruction.*
10/03/2016	**Supplemental** *Supplemental Authorities in Support of Opposition to Supplemental Brief Regarding Kazalyn Instruction.*
10/05/2016	*CANCELED* **Motion to Associate Counsel** (8:30 AM) (Judicial Officer Cadish, Elissa F.) *Vacated* *Petitioner's Motion to Associate Counsel*
10/19/2016	**Order** *Order*
10/27/2016	**Order Granting** *Order*
11/02/2016	**Order Admitting to Practice** *Order Admitting to Practice*
11/21/2016	**Reply to Opposition** *Reply to State's Opposition to Supplemental Brief on the Kazalyn Instructional Error*
12/05/2016	**Argument** (8:30 AM) (Judicial Officer Cadish, Elissa F.) Parties Present Minutes *10/17/2016 Reset by Court to 12/05/2016* Result: Writ Denied
01/11/2017	**Motion for Relief** *Motion And Notice Of Motion For Leave to File Supplement To Petition For Writ Of Habeas Corpus (Post-Conviction)*
01/11/2017	**Supplement** *Supplement to Petition For Writ of Habeas corpus (Post-Conviction)*
01/18/2017	**Stipulation and Order** *Stipulation to Continue Hearing on Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus.*
01/19/2017	**Opposition to Motion** *Opposition to Motion for Leave to Supplement*
01/19/2017	**Motion to Strike** *Motion to Strike Fugitive Supplement*
02/02/2017	**Reply** *Petitioner's Reply to Opposition to Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus (Post-Conviction)*
02/02/2017	**Opposition to Motion** *Petitioner's Opposition to Motion to Strike Fugitive Supplement*
02/03/2017	**Reply to Opposition** *Reply to Opposition to Motion to Strike Fugitive Supplement.*
02/13/2017	**Status Check** (8:30 AM) (Judicial Officer Cadish, Elissa F.) **02/13/2017, 04/03/2017** Parties Present *02/27/2017 Reset by Court to 02/13/2017* Result: Matter Heard
02/13/2017	**Motion** (8:30 AM) (Judicial Officer Cadish, Elissa F.) *Defendant's Motion and Notice of Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus (Post-Conviction)* *01/23/2017 Reset by Court to 02/13/2017* Result: Granted
02/13/2017	**Motion to Strike** (8:30 AM) (Judicial Officer Cadish, Elissa F.) *State's Motion to Strike Fugitive Supplement* Result: Denied
02/13/2017	**All Pending Motions** (8:30 AM) (Judicial Officer Cadish, Elissa F.) Parties Present

	Minutes
	Result: Matter Resolved
03/01/2017	**Order Granting Motion**
	Order
03/20/2017	**Objection**
	Objection to Petitioner's Proposed Schedule for Disclosure, Discovery and Evidentiary Hearing.
03/27/2017	**Reply**
	Reply to Objection to Petitioner's Proposed Schedule for Disclosure, Discovery, and Evidentiary Hearing
05/17/2017	**Argument** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
	Argument: Hurst Briefing
08/28/2017	**Status Check** (8:30 AM) (Judicial Officer Cadish, Elissa F.)
	Status Check: Evidentiary Hearing

Exhibit 7

(*Walker* Docket)

02/16/2016	**Petition** *Petition for Writ of Habeas Corpus (Post-Conviction)*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 41 through 70*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 71 through 90*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 91-106*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 107 through 118*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 119 throught 133*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibit 134 through 148*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 149 through 165*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhobitis 166 through 199*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 200 through 215*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 216 through 230*
02/16/2016	**Exhibits** *Exhibits in Support of Petition for Writ of Habeas Corpus Exhibits 231 through 268*
02/17/2016	**Receipt of Copy** *Receipt of Copy*
04/05/2016	**Petition for Writ of Habeas Corpus** (9:30 AM) (Judicial Officer Adair, Valerie) Parties Present Minutes Result: Briefing Schedule Set
05/11/2016	**Opposition** *State's Response and Motion to Dismiss Defendant's Second Post-Conviction Petition for Writ of Habeas Corpus*
06/17/2016	**Motion** *Motion to Disqualify*
06/22/2016	**Opposition to Motion** *Opposition to Motion to Disqualify*
06/24/2016	**Reply to Opposition** *Reply to Opposition to Motion to Disqualify*
06/27/2016	**Affidavit** *Affidavit of Valerie Adair in Response to Request to Disqualify Judge*
06/30/2016	**Motion to Disqualify Judge** (3:00 AM) (Judicial Officer Barker, David) Minutes Result: Denied
06/30/2016	**Order** *Order Denying Motion to Disqualify Judge Valerie Adair*
07/12/2016	**Motion to Stay** *Motion for Stay*
07/14/2016	**Notice of Motion** *Notice of Hearing on Motion for Stay*
07/15/2016	**Opposition** *Opposition to Motion for Stay*
07/19/2016	**Reply to Opposition** *Reply to Opposition to Motion to Stay*
07/26/2016	**Motion For Stay** (9:30 AM) (Judicial Officer Adair, Valerie) *Defendant's Notice of Hearing on Motion for Stay* Parties Present Minutes Result: Denied Without Prejudice
08/02/2016	**Order** *Order Denying Motion for Stay*
08/26/2016	**Motion** *Motion and Notice of Motion for Evidentiary Hearing*
08/26/2016	**Opposition to Motion to Dismiss** *Opposition to States Response and Motion to Dismiss*

08/29/2016	**Exhibits** *Exhibits in Support of Motion and Notice of Motion for Evidentiary Hearing*
08/29/2016	**Exhibits** *Exhibits in Support of Opposition to Motion to Dismiss*
08/29/2016	**Exhibits** *Exhibits in Support of Opposition to Motion to Dismiss*
08/29/2016	**Certificate of Mailing** *Certificate of Mailing*
08/29/2016	**Exhibits** *Exhibits in Support of Opposition to Motion to Dismiss*
08/29/2016	**Exhibits** *Exhibits in Support of Opposition to Motion to Dismiss*
08/30/2016	**Opposition to Motion** *Opposition to Motion for Evidentiary Hearing.*
09/19/2016	**Exhibits** *Exhibit to Opposition to Motion for Stay.*
10/18/2016	**Reply** *Reply to Opposition to Motion to Dismiss.*
10/27/2016	**Recorders Transcript of Hearing** *Recorder's Transcript RE: Defendant's Notice of Hearing on Motion for Stay July 26, 2016*
11/28/2016	**Motion for Discovery** *Motion and Notice of Motion for Leave to Conduct Discovery*
11/29/2016	**Exhibits** *Exhibits in Support of Motion and Notice of Motion for Leave to Conduct Discovery (Exhibits A through Z)*
11/29/2016	**Exhibits** *Exhibits in Support of Motion and Notice of Motion for Leave to Conduct Discovery (Exhibits VV through TT.1)*
11/29/2016	**Exhibits** *Exhibits in Support of Motion and Notice of Motion for Leave to Conduct Discovery (Exhibits AA through VV)*
12/01/2016	**Opposition** *Opposition to Motion for Leave to Conduct Discovery.*
12/05/2016	**Reply to Opposition** *Reply to Opposition to Motion for Leave to Conduct Discovery; Motion and Notice of Motion for Evidentiary Hearing*
01/09/2017	**Motion** *Motion and Notice of Motion for Leave to File Supplement*
01/09/2017	**Supplement** *SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)*
01/10/2017	**Motion to Strike** *Motion to Strike Fugitive Supplement.*
01/12/2017	**Opposition to Motion** *Opposition to Motion for Leave to File Supplement.*
01/12/2017	**Supplement** *Supplement to Motion For Evidentiary Hearing*
01/13/2017	**Opposition to Motion** *Opposition to Motion to Strike Fugitive Supplement*
01/17/2017	*CANCELED* **Petition for Writ of Habeas Corpus** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - per Attorney or Pro Per* *07/12/2016 Reset by Court to 09/13/2016* *09/13/2016 Reset by Court to 11/15/2016* *11/15/2016 Reset by Court to 01/17/2017*
01/17/2017	*CANCELED* **Response and Countermotion** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - per Attorney or Pro Per* *State's Response and Motion to Dismiss Defendant's Second Post-Conviction Petition for Writ of Habeas Corpus* *07/12/2016 Reset by Court to 09/13/2016* *09/13/2016 Reset by Court to 11/15/2016* *11/15/2016 Reset by Court to 01/17/2017*
01/17/2017	*CANCELED* **Motion** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - per Attorney or Pro Per* *Petitioner's Motion for Evidentiary Hearing* *09/06/2016 Reset by Court to 09/13/2016* *09/13/2016 Reset by Court to 11/15/2016* *11/15/2016 Reset by Court to 01/17/2017*
01/17/2017	*CANCELED* **Motion** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - per Attorney or Pro Per* *Petitioner's Motion for Leave to Conduct Discovery* *12/13/2016 Reset by Court to 01/17/2017*
01/17/2017	*CANCELED* **Motion** (9:30 AM) (Judicial Officer Adair, Valerie)

	Vacated - per Attorney or Pro Per *Defendant's Reply to Opposition to Motion for Leave to Conduct Discovery; Motion for Evidentiary Hearing* *12/15/2016 Reset by Court to 01/17/2017*
01/17/2017	*CANCELED* **Motion for Leave** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - Duplicate Entry* *Defendant's Motion for Leave to File Supplement*
01/17/2017	*CANCELED* **Motion** (9:30 AM) (Judicial Officer Adair, Valerie) *Vacated - per Attorney or Pro Per* *Defendant's Supplement to Petition for Writ of Habeas Corpus (Post-Conviction)*
01/20/2017	**Reply to Opposition** *Reply to Opposition to Motion to Strike Fugitive Supplement*
01/25/2017	**Reply** *Reply to Opposition to Motion for Leave to File Supplement*
02/07/2017	**Motion to Strike** (9:30 AM) (Judicial Officer Adair, Valerie) **02/07/2017, 02/13/2017** *State's Motion to Strike Fugitive Supplement.* *01/17/2017 Reset by Court to 02/07/2017* Result: Decision Pending
02/07/2017	**Motion for Leave** (9:30 AM) (Judicial Officer Adair, Valerie) **02/07/2017, 02/13/2017** *Petitioner's Motion for Leave to File Supplement* Result: Decision Pending
02/07/2017	**All Pending Motions** (9:30 AM) (Judicial Officer Adair, Valerie) Parties Present Minutes Result: Decision Pending
02/13/2017	**All Pending Motions** (3:00 AM) (Judicial Officer Adair, Valerie) Minutes Result: Decision Made
02/21/2017	**Recorders Transcript of Hearing** *Recorder's Transcript RE: State's Motion to Strike Fugitive Supplement; Petitioner's Motion for Leave to File Supplement February 7, 2017*
03/08/2017	**Opposition** *Opposition and Motion to Dismiss Supplement.*
06/06/2017	**Hearing** (9:30 AM) (Judicial Officer Adair, Valerie) *04/18/2017 Reset by Court to 06/06/2017*
06/06/2017	**Opposition and Countermotion** (9:30 AM) (Judicial Officer Adair, Valerie) *State's Opposition and Motion to Dismiss Supplement* *04/18/2017 Reset by Court to 06/06/2017*

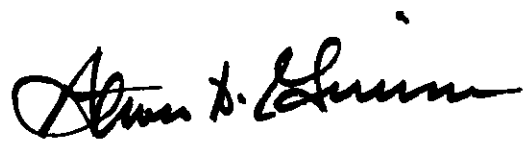
CERTIFICATE OF SERVICE

I hereby certify that service of this Motion to Amend or Supplement was made this 6th day of April 2017, by Electronic Filing and by email to:

Jonathan E. VanBoskerck
Chief Deputy District Attorney
Office of the Clark County District Attorney
Jonathan.VanBoskerck@clarkcountyda.com

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

Electronically Filed
04/07/2017 08:31:14 AM



CLERK OF THE COURT

ORDR
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
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DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 81C053867
DEPT NO: XVII

ORDER STRIKING AMENDED FIFTH PETITION

DATE OF HEARING: March 17, 2017
TIME OF HEARING: 9:30 A.M.

On December 1, 2016, Petitioner filed an Amended Petition for Writ of Habeas Corpus (Amended Fifth Petition). Respondent filed a Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction) (Motion to Strike) on December 12, 2016. On February 3, 2017, Petitioner filed an Opposition to Motion to Strike. Respondent filed a Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction) on February 6, 2017. This Court held a hearing on March 17, 2017, and struck the Amended Fifth Petition after entertaining argument.

THEREFORE, IT IS HEREBY ORDERED that Petitioner's Amended Fifth Petition is struck from the record pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006).

DATED this 4 day of March 2017.

MICHAEL VILLANI
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction) was made this 28th day of March, 2017, by Electronic Filing to:

JONAH J. HORWITZ,
(pro hac vice)
Assistant Federal Public Defender
Email: jonah_horwitz@fd.org

DEBORAH A. CZUBA,
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Counsels for Petitioner

E. Davis

Employee for the District Attorney's Office

JEV/ed

Eileen Davis

From: Eileen Davis
Sent: Tuesday, March 28, 2017 10:43 AM
To: 'jonah_horwitz@fd.org'; 'deborah_a_czuba@fd.org'; 'parmeni@gcmaslaw.com'
Cc: Jonathan VanBoskerck; Eileen Davis
Subject: Samuel Howard, 81C053867.
Attachments: Howard, Samuel, 81C053867, Ordr. Striking Amended Fifth Petition..pdf

Order Striking Amended Fifth Petition.

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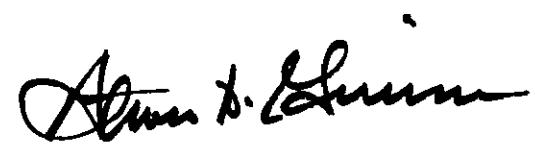

CLERK OF THE COURT

OPPM
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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 81C053867 DEPT NO: XVII

OPPOSITION TO MOTION TO AMEND AND OR SUPPLEMENT FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits this Opposition to Motion to Amend and or Supplement Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

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

POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Court summarized the facts of this case in the Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth demand for habeas relief:

> On March 26, 1980, around noon, a Sears' security officer, Keith

Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.

Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.

Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan

indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard

went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[1]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is

[1] This evidence was admitted to show identity and motive for the Monahan murder.

located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[2] Howard also stated he was on veteran's disability in New York.[3] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 12-19 (footnotes in original)).

STATEMENT OF THE CASE

This Court also set forth the vast majority of the procedural history of this case in the

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[2] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[3] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

2010 Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth habeas petition:

> On May 20, 1981 defendant Samuel Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
>
> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
>
> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
>
> Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.
>
> Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.
>
> A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.
>
> At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.
>
> On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.
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> The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the

district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felongy - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper,

the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[5]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[6]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the

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[4]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[5] Collier was decided two years after Howard's trial.

[6] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments,

failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[7]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to

[7] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 1-12 (footnotes in original)).

This Court denied Petitioner's fourth habeas petition. (Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 26-33). Petitioner challenged this Court's decision before the Nevada Supreme Court. (Notice of Appeal, filed on December 21, 2010). Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, 128 Nev. 736, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed but the FPD failed to file a separate motion to seal the pleading. Id. at 739, 291 P.3d at 139. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at 748, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. (Order of Affirmance, filed July 30, 2014, attached to

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[8] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010._____.

Clerk's Certificate, filed October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 1898 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 5, 2016). Respondent filed an opposition and motion to dismiss on November 2, 2016. (Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction) (Opposition and Motion to Dismiss), filed November 2, 2016).

On December 1, 2016, Petitioner filed an amended fifth state habeas petition. (Amended Petition for Writ of Habeas Corpus (Post-Conviction) (Amended Fifth Petition), filed December 1, 2016). The State moved to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). (Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction), filed December 12, 2016). Petitioner opposed this request. (Opposition to Motion to Strike, filed February 3, 2017). This Court held a hearing on March 17, 2017, and after entertaining argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). An order memorializing this decision was filed on April 7, 2017. (Order Striking Amended Fifth Petition, filed April 7, 2017).

On March 27, 2017, Petitioner filed an opposition to the State's request to dismiss the Fifth Petition. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017). Respondent's reply to Petitioner's opposition was filed on April 4, 2017. (Reply to Opposition to Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction), filed April 4, 2017).

On April 6, 2017, Petitioner again ignored basic Nevada procedural rules by demanding reconsideration of this Court's decision to strike his Amended Fifth Petition without requesting leave to do so in advance. (Motion to Amend and or Supplement, filed April 6, 2017). The States opposition follows.

ARGUMENT

The FPD again ignores basic Nevada procedural rules in its quest to frustrate

imposition of sentence through endless delay. This Court should summarily deny Petitioner's Motion to Amend and or Supplement as the impermissible request to reconsider that it is. Should this Court reach the merits of the request to amend, Petitioner still fails to address the requirements of NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). As such, this Court should continue to uphold Nevada's procedural requirements and deny the Motion to Amend and or Supplement.

I. *Petitioner's Failure to Request Leave Requires Denial*

Petitioner's Motion to Amend or Supplement demands that this Court reconsider the decision to strike the Amended Fifth Petition for failure to comply with NRS 34.750(5) and Barnhart. However, the FPD once again engages in the skullduggery of ignoring basic Nevada procedural requirements. This Court should continue to hold the FPD accountable for its blatant decisions to ignore mandatory obligations that apply to every litigant.

The District Court Rules of Nevada (DCR) make clear that once an issue has been disposed of a party may not reassert the same complaint without securing leave of court in advance:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of court granted upon motion therefor, after notice of such motion to the adverse parties.

DCR 13(7).

The Rules of Practice for the Eighth Judicial District Court (EDCR) similarly bar litigants from repeatedly seeking the same relief:

> When an application or a petition for any writ or order has been made to a judge and is pending or has been denied by such judge, the same application, petition or motion may not again be made to the same or another district court judge, except in accordance with any applicable statute and upon the consent in writing of the judge to whom the application, petition or motion was first made.

EDCR 7.12.

The Nevada Supreme Court has held that the law does not favor multiple applications for the same relief. Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388,

873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing ... The obvious reason for this rule is that successive motions for rehearing tend to unduly prolong litigation"); 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."). The less than favorable view of successive applications for the same relief explains why there is no right to appeal the denial of a motion for reconsideration. See, Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 346 (1995). It also justifies why a motion for reconsideration does not toll the time for filing a notice of appeal. See, In re Duong, 118 Nev. 920, 923, 59 P.3d 1210, 1212 (2002).

The Fifth Petition raised only one issue, whether appellate reweighing of aggravating and mitigating circumstances was unconstitutional in light of Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). (Fifth Petition, p. 7-8). The Fifth Petition is silent as to whether the beyond a reasonable doubt standard applies to the weighing decision. Id. Petitioner raised the burden of proof issue in Claims One and Two of the Amended Fifth Petition as it related to appellate reweighing and the original jury determination. (Amended Fifth Petition, p. 7-9). Importantly, Petitioner addressed amendment and supplementation of the Fifth Petition to include the claims of the Amended Fifth Petition in his pleading opposing the State's request to strike the Amended Fifth Petition. (Opposition to Motion to Strike, filed February 3, 2017, p. 3-19). Petitioner denied he was required to request leave of court. Id. at p. 3-8. Much as he does in his Motion to Amend and or Supplement, Petitioner argued that retroactive permission should be granted based on Rule 15 of the Nevada Rules of Civil Procedure (NRCP), federal authority and precedents from sister states. Id. at p. 8-19. This Court considered all of these arguments and rejected them. (Odyssey, Register of Actions, Minutes, March 17, 2017; Order Striking Amended Fifth Petition, filed April 7, 2017).

If Petitioner wanted this Court to reconsider striking the Amended Petitioner, the FPD

should have complied with basic court rules and asked this Court for permission to seek reconsideration. Instead, the FPD attempted to re-litigate the burden of proof issue and the Motion to Strike in his recent pleadings without securing leave to seek reconsideration. (Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss, filed March 27, 2017, p. 13-14, 25, 29-33; Motion to Amend and or Supplement, filed April 6, 2017, p. 3-14). Such skullduggery should not be tolerated. See, Righetti v. Eighth Judicial District Court, 133 Nev. __, __, 388 P.3d 643, 648 (2017) (declining to adopt a rule that "rewards and thus incentivizes less than forthright advocacy").

II. *Resort to NRCP 15 and its Federal Counterpart is Unwarranted*

This Court should ignore Petitioner's attempt to muddy the waters with tangential citation to what is, at best, mere persuasive authority when NRS 34.750(5) and Barnhart are the controlling standard on amending and supplementing habeas petitions.

Petitioner opines at great length on the requirements for amendment under NRCP Rule 15(a) and its federal counterpart. (Motion to Amend and or Supplement, filed April 6, 2017, p. 4-10). This irrelevant discussion is substantially similar to the dissertation offered by Petitioner's Opposition to Motion to Strike. (Opposition to Motion to Strike, filed February 3, 2017, p. 9-19). The State has already addressed these arguments in its Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction). (Reply to Opposition to Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction), filed February 6, 2017, p. 9-20).[9] Ultimately, Petitioner's contentions are unpersuasive since the Nevada Supreme Court has declined to apply NRCP 15 to habeas proceedings. State v. Powell, 122 Nev. 751, 755-59, 138 P.3d 453, 456-58 (2006).

III. *Petitioner Again Fails to Comply with NRS 34.750(5) and Barnhart*

It is undisputed that this Court has broad discretion to deny leave to amend or supplement a habeas petition. NRS 34.750(5) and Barnhart provide guidance in the exercise

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[9] The State incorporates that discussion into this pleading by reference.

of that authority. Collectively, they embody the common-sense ideas that a litigant owes a judge the respect of asking permission to raise a claim after pleading has closed and an explanation for the need to do so. The Federal Public Defender's unwillingness to accord these basic signs of respect to the judiciary of Nevada is troubling in the extreme.

Chapter 34 allows a habeas petitioner to file a pro per petition without the assistance of a lawyer. NRS 34.724(1). A court may appoint an attorney for an indigent petitioner under the appropriate circumstances. NRS 34.750(1). Appointment of counsel is mandatory where a first petition challenges a sentence of death. NRS 34.820(1). Appointed counsel may supplement the pro per petition once within thirty days of appointment. NRS 34.750(3). After that, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Such leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]" Barnhart, 122 Nev. at 303, 130 P.3d at 652. A finding of good cause to expand the issues should be made "explicitly on the record" and should enumerate "the additional issues which are to be considered." Id. at 303, 130 P.3d at 652. In Barnhart the Nevada Supreme Court affirmed a district court's decision to deny leave to expand the issues because "Counsel for petitioner provided no reason why that claim could not have been pleaded in the supplemental petition." Id. at 304, 130 P.3d at 652.

This case suffers from the same defect that caused the Nevada Supreme Court to affirm in Barnhart, "Counsel for petitioner provided no reason why that claim could not have been pleaded in the supplemental petition." Id. Petitioner now complains that his "attorneys … raised Claim Two as soon as their research into Claim One made them aware of it." (Motion to Amend and or Supplement, filed April 6, 2017, p. 7). The FPD's contention is belied by the chronology of this litigation. Hurst was published on January 12, 2016. The Fifth Petition was filed on October 5, 2016. (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 5, 2016). In seeking leave to amend Petitioner offers citation to Rauf v. State, 145 A.3d 430 (Del. 2016), and Hurst v. State, 202 So.3d 40, 44 (Fla. 2016), as evidence that amendment would not be futile. (Motion to Amend and or Supplement, filed April 6, 2017, p. 5-6). The Delaware Supreme Court's opinion in Rauf was published on

August 2, 2016, predating the filing of the Fifth Petition by roughly two months. The Florida Supreme Court's opinion on remand in Hurst was published on October 14, 2016, less than two weeks after the Fifth Petition was filed. Just what research was the FPD doing that caused them to delay filing the Amended Fifth Petition until December 1, 2016? (Amended Petition for Writ of Habeas Corpus (Post-Conviction) (Amended Fifth Petition), filed December 1, 2016).

It is far more likely that the FPD saw a chance to delay imposition of sentence by sitting on the claim until just before NRS 34.726(1) kicked in. Capital habeas litigants have an incentive to engage in such delaying tactics. Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"). Concern over delay is heightened where the FDP is involved. The FPD's institutional culture evidences a religiously militant opposition to the death penalty such that all other obligations are sacrificed. See, Commonwealth v. Spotz, 610 Pa. 17, 160-93, 18 A.3d 244, 329-49 (Pa. 2011) (concurrence of Chief Justice Castille, criticizing FPD for intentional delay of capital habeas proceedings; describing pleadings as prolific, abusive and offered in bad faith; and indicating that FPD strategies were ethically dubious); Debra Cassens Weiss, Federal PDs have 40 days to explain inmate's letter saying he didn't authorize SCOTUS appeal, ABA Journal (July 1, 2014) (http://www.abajournal.com/news/article/federal_pds_have_40_days_to_explain_inmates_letter_saying_he_didnt_authoriz). Indeed, this unauthorized certiorari petition resulted in a referral *by the United States Supreme Court* to the Pennsylvania Supreme Court's Disciplinary Board. Ballard v. Pennsylvania, 2014 U.S. LEXIS 4780 (2014).

The FPD's conduct of Hurst litigation in Clark County substantiates such concerns. The FPD has engaged in a pattern of waiting until just before the one-year deadline of NRS 34.726(1) to file Hurst claims in eighteen (18) cases before the Eighth Judicial District Court and the Nevada Supreme Court. (Adams, Larry (C069704), Fifth Supplement to Petition for

Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016; McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017).

The above listed 18 pleadings were filed by four different branch offices of the FPD. The Nevada FPD filed fourteen of them. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of

Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017). The FPD Central Division of California office filed two. (Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017). The Arizona branch office filed one. (McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017). And, the Idaho FPD filed one in this case. (Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016).

Such gamesmanship does not amount to a legitimate explanation for delay under Barnhart. This Court should exercise its broad discretion under NRS 34.750(5) to send the FPD a message that it may not ignores laws passed by the Nevada Legislature and precedent authored by the Nevada Supreme Court. The FPD is an agent of the federal government and its misbehavior in Nevada courts demonstrates the wisdom of the United States Supreme Court's cautionary admonishment that federal habeas "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." Harrington v. Richter, 562 U.S. 86, 103, 131 S.Ct. 770, 787 (2011) (original quotation marks and citation omitted). The FPD deficiently failed to research the requirements for amendment in Nevada and thus failed to understand the importance of NRS 34.750(5) and Barnhart. The FPD believed it could

delay brining Petitioner's second Hurst complaint for almost a year and thereby create further delay through another round of pleading without suffering any consequences. Petitioner now asks this Court to aid and abet his skullduggery by allowing an amendment that would force yet another round of pleading and delay. Petitioner has been litigating this case for over thirty years. This Court should exercise its broad discretion to prevent such abusive litigation tactics by denying the Motion to Amend and or Supplement.

CONCLUSION

The Nevada Supreme Court has warned that rules exist for a reason and that violating them comes with a price:

> In the words of Justice Cardozo,
>
> > Every system of laws has within it artificial devices which are deemed to promote … forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.
>
> Benjamin N. Cardozo, The Paradoxes of Legal Science 68 (1928). The district court should have upheld the requirements mandated in Hill and therefore should have dismissed the case against Scott.

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

Based on the foregoing, Petitioner's Motion to Amend and or Supplement should be denied.

DATED this 12th day of April 2017.

Respectfully submitted,

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Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Opposition to Motion to Amend And Or Supplement Fifth Petition for Writ of Habeas Corpus (Post-Conviction) was made this 12th day of April, 2017, by Electronic Filing to:

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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

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

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing[1]:
Time of Hearing:

(Death Penalty Case)

[1] As Mr. Howard discussed in his motion to amend or supplement, he believes the motion can be ruled upon without a hearing. *See* Mot. to Am., filed April 6, 2017 (hereinafter "MTA"), at 13. The State has not argued to the contrary. *See generally* Oppo. to Mot. to Am., filed April 12, 2017 (hereinafter "MTA Oppo.").

REPLY IN SUPPORT OF MOTION TO AMEND OR SUPPLEMENT

The State's opposition to Petitioner Samuel Howard's motion to amend is rooted entirely in a mischaracterization of this Court's previous rulings and of the case's procedural posture. It is wholly unpersuasive and should be denied.

DATED this 17th day of April 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

There are two components to the State's opposition, both devoid of merit. First, the State falsely insists that Mr. Howard was already denied leave to amend. Second, the State continues to offer a completely mistaken and unsupported explanation for why Mr. Howard is amending, which is flatly contradicted by all of the evidence in this case. The State's two arguments are equally insubstantial, and Mr. Howard respectfully asks the Court to reject them both and to grant Mr. Howard leave to amend.

I. Mr. Howard Has Not Been Denied Leave To Amend

Much of the State's opposition is based on its erroneous view that Mr. Howard has already been denied leave to amend. From that flawed premise, the State then reasons that Mr. Howard is effectively seeking reconsideration, and was therefore required to seek leave of court before filing his motion. *See* MTA Oppo., at 14–16. As an initial matter, it is perplexing that the State would criticize Mr. Howard for a failure to seek leave before filing a motion seeking *leave* to amend. Apparently, the State would have Mr. Howard request permission to request permission. Such an approach is too irrational to compel a response.

In any event, the State's belief that Mr. Howard has already been denied leave to amend is demonstrably wrong. The Court's written order, drafted by counsel for the State himself, indicates only that the amended petition was "struck." Order, filed April 7, 2017. Similarly, the Court stated in its oral ruling that it was "granting the motion to strike." MTA, Ex. 2, at 10. In neither place did the Court say anything about refusing leave to amend. Indeed, undersigned counsel made clear at the March 17, 2017 hearing that "if the motion to strike was granted on the basis that we didn't seek leave in advance of filing the amended petition, we would ask for an opportunity to file a formal motion seeking leave to add the second claim." *Id.* at 13. The Court responded, "All right," *id.*, which hardly suggests that it regarded itself as denying such a motion at the very same hearing.

That straightforward reading of the record is also the most sensible one in light of the pleadings. When it struck the amended petition, the Court was granting the State's motion. The

very first line of the argument section of that motion summed up the State's position: "This Court should strike the Amended Fifth Petition because Petitioner failed to seek leave of court to file a supplemental pleading and ignored his obligation to allege good cause to amend." Mot. to Strike, filed Dec. 12, 2016, at 16. It was *that* argument that the Court embraced on March 17, 2017 when it granted the motion. Furthermore, although the State is correct that there was some debate in the motion-to-strike litigation over whether Mr. Howard could be granted leave to amend, *see* MTA Oppo., at 15, the order itself did not settle that debate.

In sum, Mr. Howard is now doing precisely what the State faulted him for not doing before: he has sought leave and alleged good cause to amend. Having obtained an order striking the amended petition on the ground that Mr. Howard did not seek leave in advance, the State is not entitled to rewrite history by changing the scope of its own granted motion, as well as the scope of the Court's order.

The State's about-face is made even more problematic here by how unusual its approach to the amended petition was to begin with. As Mr. Howard has detailed in other pleadings, the State has in the vast majority of cases allowed inmates to file amended petitions in the absence of leave and without objection. *See* Oppo. to Mot. to Strike, filed Feb. 3, 2017 ("MTS Oppo."), at 5–6. What the State has done here, then, is to invoke an almost unprecedented practice—that of demanding a motion for leave—and then try its best to prevent Mr. Howard from satisfying its own demand when he submits the very motion it insisted upon. The State has thereby created an exceedingly unjust system by lulling Mr. Howard into a procedural trap from which there is no escape. It is unsettling that the State is willing to contort itself into such a logical pretzel in its quest to avoid dealing with the substance of the serious constitutional challenge that Mr. Howard has made to his death sentence. And it is even more unsettling that the State would accuse Mr. Howard of "gamesmanship" under such circumstances, MTA Oppo., at 20, when Mr. Howard's only interest has been in litigating the merits of his claim and when he has been constantly thwarted by the State's ever-evolving excuses for why those merits are unreachable.

In sum, the State's assertion that Mr. Howard has already been denied leave to amend is mistaken, and the motion to amend should be addressed.

II. Mr. Howard Has Good Cause To Amend

After doing its best to deprive Mr. Howard of the opportunity to even seek amendment, the State reluctantly turns to whether amendment would be warranted if its obstructionism fails.[2] Its contentions there are equally misplaced.

First, the State's vigorous denunciation of Mr. Howard for not offering an account of why Claim Two arose after the original petition was filed, *see* MTA Oppo., at 16–21, is utterly without foundation. In his motion to amend, and with the backing of a sworn declaration, Mr. Howard explained why Claim Two was added to the petition: because undersigned counsel's research into Claim One made them aware of it. *See* MTA, at 7; *see also id.*, Ex. 4, at 2–3. The State's free-floating indignation with death row inmates and their federal habeas attorneys, as well as with everything they file in court, does not defeat the commonplace description that undersigned counsel have given under oath.

Suspicious of that quite unremarkable phenomenon, which occurs in thousands of law offices on a daily basis, the State offers its typical overheated rhetoric about Mr. Howard's supposed attempt to delay a non-existent execution date. The State's misguided rationale for discerning delay is that some of the caselaw upon which Mr. Howard is now relying was decided prior to the filing of the original petition, beginning with *Rauf v. State*, 145 A.3d 430 (Del. 2016), which was handed down on August 2, 2016. *See* MTA Oppo., at 17–18. From that, the State draws the wild inference that undersigned counsel must have known of Claim Two when they submitted the original petition and were keeping it in their back pockets to reveal at a later date. *See id.* While flattering, the State's portrait of undersigned counsel as omniscient legal thinkers who are immediately cognizant of every case and its legal implications is unfortunately inaccurate.

As with all attorneys, it sometimes takes time for undersigned counsel to fully digest new precedent and apply it to their cases, especially in a fast-moving area of law such as this one. Here, it took undersigned counsel approximately four months from the decision in *Rauf* to

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[2] The State incorporates its pleadings on the motion to strike into its response. *See* MTA Oppo., at 16 n.9. Mr. Howard does the same here with his opposition to the motion to strike, filed February 3, 2017.

proffer Claim Two. *Rauf* is a ninety-one page decision, comprising four separate writings. Mr. Howard respectfully submits that it is not unreasonable for counsel to take four months to process a lengthy, complex opinion from Delaware, interpret its ramifications for the Nevada regime, consider those ramifications in his own case, and draft an amended petition. Presumably, the Clark County District Court judges in *McKenna* and *Walker*—which the State conspicuously ignores—agree, as both allowed *Hurst*[3] supplements even later than Mr. Howard's. *See* MTA, at 12. Notwithstanding the State's personal disappointment with the pace of undersigned counsel's work, that pace reflects nothing more than the nature of capital defense, which requires attorneys to navigate a complex area of law on behalf of multiple death row inmates at the same time. It certainly does not reflect any desire to deliberately withhold a claim, an allegation that is directly contradicted by a sworn declaration, *see id.*, Ex. 4, at 2–3, and grounded in nothing more than the State's imagination and its vehement and reflexive hostility to capital defense attorneys.

It is an allegation, moreover, that does not even have a footing in common sense. Rather than a mundane example of the speed at which law offices are able to accomplish their assignments, the State sees the timing of Claim Two as a complex maneuver to postpone an execution through some mysterious process whose workings it has never quite described. *See* MTA Oppo., at 17–18. As Mr. Howard has repeatedly reminded the State, though, he has not pursued a stay in his federal habeas case. *See* MTA, at 7. Quite to the contrary, he is actively pursuing his claims in that proceeding and is in the middle of extensive litigation there, all because he wants to vindicate his constitutional rights as quickly as he can, *see id.*, an extremely important part of the current state of affairs that the State has never even acknowledged in any of its numerous lectures on delay. In light of the State's silence, it is unclear how a post-conviction action causes the delay of an execution that is nowhere near the horizon in the absence of any requested stay. At a bare minimum, there is no reason whatsoever for the Court to share the State's speculative and biased assumptions. Considering the procedural posture of the case, the most logical account is the true one: through their ongoing research, undersigned counsel

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[3] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

discovered a viable new challenge to Mr. Howard's death sentence, and they promptly presented it.

The State's tiresome indictment of Mr. Howard for deliberate delay makes even less sense than usual with respect to the issue at hand, i.e., that of amendment, since the State's vexatious litigation has produced far more delay than has Mr. Howard's campaign to have the merits of his claims adjudicated. It took two months for Mr. Howard to amend his petition, hardly a significant amount of time in this thirty-five year old case. In truth, his amendment should not have delayed the proceeding even that long. For by the time the amended petition was filed, the State had already opposed the original petition and moved for its dismissal. *See* Oppo. & Mot. to Dismiss, filed Nov. 2, 2016 (hereinafter "MTD"). In that pleading, the State responded at length to much of the law underpinning Claim 2. As with Claim 1, Claim 2 flows from *Hurst* and relates to what facts must be found by a jury before a defendant can be sentenced to death. *See* Am. Pet. for Habeas Corpus, filed Dec. 1, 2016 (hereinafter "Am. Pet."), at 8–9. And in its motion to dismiss, the State explored in great detail the law on that issue. *See* MTD, at 12–28. It would have taken little for the State to revise its motion to dismiss to address a single, closely related issue. When he presented his amended petition, Mr. Howard fully expected the State to file such a revised motion, in keeping with its nearly universal practice. *See* MTS Oppo., at 5–6. In fact, that is just what Mr. Howard proposed to the State at the time. *See id.*, Ex. 2. If the State had taken up that proposal and acted in accordance with its established norms, the case might well have been resolved by the Court by now and well on its way to an appeal, an expeditiousness that Mr. Howard would have welcomed. Instead, the State bogged the case down in a gratuitous round of pleadings and a gratuitous hearing.

In the immediate aftermath of that unwarranted delay, the State's conduct directly led to another. It enmeshed everyone in the current litigation by telling Mr. Howard that on second thought he could *not* seek leave to amend, after inventing a protocol designed solely to force him into doing so. In short, it is undeniably the State's relentless crusade to keep Claim Two from receiving its day in court that has dragged this case out unnecessarily. The State cannot be permitted to sow delay and then use the delay to harm Mr. Howard.

Ostensibly in support of its delay theory, the State reprises its uninformed and irrelevant polemic about Federal Defender offices. *See* MTA Oppo., at 17–18. In earlier filings, Mr. Howard has corrected the State's offensive misrepresentations about undersigned counsel's office, *see* MTS Oppo., at 16, and he will not belabor them.[4] Undeterred by the facts, counsel for the State continues to express his passionate hostility to capital defense attorneys in a copy-and-paste speech that serves only to distract—as always—from the actual issues presented. Mr. Howard will only add here that the State's customary diatribe is especially out of place on the amendment question. Specifically, the State's putative smoking gun is that multiple Federal Defender offices have filed *Hurst* petitions in Nevada around the same time. *See* MTA Oppo., at 18–19. But every *Hurst* petition listed by the State was filed in January 2017. *See id.* Mr. Howard's was filed in October 2016, and his amended petition was filed on December 1, 2016. It is hard to see why the State is lambasting undersigned counsel for colluding with attorneys about the timing of *Hurst* petitions when undersigned counsel's claims were filed before any of theirs. In overview, the State has excoriated the Federal Defender offices in pleading after pleading, without introducing a single shred of evidence to suggest that its rants are pertinent to any of the issues before the Court, let alone that they are justified. Opposing counsel's persistent vendetta against capital defense is emotional, not legal, and it has no bearing here.

Finally, it bears mentioning that a denial of leave to amend would ultimately only diminish the influence of the Nevada courts. If leave is denied, Mr. Howard will seek relief on the claim in a federal habeas action. At that time, the habeas judge will ask whether the state courts barred the claim on an "independent and adequate state ground." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2554 (1991). To this day, the State has not offered even one example in which leave to amend a petition was denied under anything resembling the

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[4] For purposes of maintaining a complete and accurate record, Mr. Howard will briefly remedy the State's latest misrepresentation about the Federal Defender offices. With no citation, the State declares that "[t]he FPD is an agent of the federal government." MTA Oppo., at 20. The Federal Defender Services of Idaho is a non-profit organization, run by the Federal Defender and overseen by a board. It is not an agent of the federal government in any meaningful sense, and as Mr. Howard has informed the State numerous times—to no avail—its exclusive mission is to represent the interests of its individual clients.

circumstances of the case at bar. In the event leave is denied, it will accordingly not be denied on the basis of an independent and adequate ground. *See Valerio v. Crawford*, 306 F.3d 742, 776 (9th Cir. 2002) ("In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established *at the time of petitioner's purported default*." (emphasis in original) (internal quotation marks omitted)). By urging a procedural rule without supplying a solitary instance of it being followed, the State is inviting the federal judiciary to denigrate Nevada's court system for arbitrary and capricious conduct in a capital case. Mr. Howard, on the other hand, is respecting the comity values embodied in post-conviction jurisprudence and is giving this Court the first opportunity to pass upon Claim Two, which it can easily do by allowing amendment.

III. Conclusion

At every turn, the State has taken great pains to avoid dealing with the substance of a serious attack on Mr. Howard's death sentence based on important new law from the Supreme Court. Now, the State accuses Mr. Howard of gamesmanship for doing precisely what the State itself has compelled him to do—seek leave to amend. Mr. Howard has taken every step he possibly could to have Claim Two receive a full and fair hearing, and that is all he has been asking for in the face of the State's perpetual obstructionism. At some point, that obstructionism must yield to fundamental fairness, which requires that amendment be granted and Claim Two decided. Mr. Howard therefore respectfully asks the Court to accept the amended petition and issue a new scheduling order for the State to file a motion to dismiss the amended petition, Mr. Howard to respond, and the State to reply.

DATED this 17th day of April 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of this Reply in Support of Motion to Amend or Supplement was made this 17th day of April, 2017, by Electronic Filing and by email to:

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/s/ Joy Fish

Joy Fish
Paralegal
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DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor | COURT MINUTES | April 19, 2017

81C053867 The State of Nevada vs Samuel Howard

April 19, 2017 3:00 AM **Defendant Howard's Petition for Writ of Habeas Corpus**

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Olivia Black

JOURNAL ENTRIES

Defendant Howard's Petition for Writ of Habeas Corpus came before this court on the April 19, 2017 Chamber Calendar. The Court now rules as follows:

On March 17, 2017 this Court struck Petitioner's Amended Fifth Petition for Writ of Habeas Corpus pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). On April 6, 2017, Petitioner filed a Motion to Amend or Supplement the Fifth Petition for Writ of Habeas Corpus. By seeking to Amend or Supplement the Fifth Petition for Writ of Habeas Corpus the Petitioner is in effect moving this Court to reconsider its decision of March 17, 2017. Said motion was filed without leave of the Court and directly after the Court struck Petitioner's Amended Fifth Petition and did not grant leave to Amend. Counsel for Petitioner justifies the present pleading on no error or oversight of this Court, but instead insists that "Contrary to its own well-established practice, the State filed a Motion to Strike Amended Petition. ... [and] [t]he Court likewise departed from its normal approach and struck the amended petition, on the basis that no leave was requested prior to its filing..." Whether or not the State in past unrelated cases has decided not to file a Motion to Strike is irrelevant to this Court. When Petitioner's counsel states this "Court" it is unclear as to whether or not Petitioner's counsel is specifically referring to Department XVII or various judges in the Eighth Judicial District Court. In any event, each case stands on its own factual and procedural history and, therefore, whether or not Department XVII has allowed supplemental Petitions in the past on unrelated cases is not a legal basis to violate the procedural rules in this case. At the March 17, 2017 hearing this Court inquired from Petitioner's counsel, Mr. Horowitz as to the procedures followed by the Federal judges he usually appears in front of and it was stated that rules are adhered to. The Court advised all counsel that it was this Court's intention to follow the procedural rules as well. It is Hereby Ordered that Petitioner's Motion to Amend or Supplement his Fifth Petition for Writ of Habeas Corpus is DENIED. It is FURTHER ORDERED that sanctions are imposed against Petitioner's counsel for attorney fees in the amount of $250.00 in which the State incurred for having to respond

to Petitioner's additional Motion to Amend after this Court denied such on March 17, 2017 and prior leave was not obtained.

Therefore, the Court disregards Petitioner's improperly raised argument contained within its Reply filed 3/27/17 and only addresses the substantive claims in his properly filed Petition. The Court rules as follows on said Petition:

The facts underlying this petition stem from a 7/30/2014 decision from the Nevada Supreme Court where the Court struck one of Petitioners two aggravating circumstances. In said decision, the Nevada Supreme Court reweighed the aggravating evidence against the mitigating evidence and re-imposed a sentence of death. Petitioner moves this Court to invalidate Petitioner's death sentence under state and federal constitutional provisions guaranteeing the right to a trial by jury on the basis that only a jury- not a judge can find the facts permitting the imposition of a death sentence. Petitioner asserts that because one of two aggravators has been nullified by Nevada's highest court, Petitioner's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers. This Court finds no merit to Petitioner's argument and rules as follows:

To overcome the procedural bars set forth by State of Nevada, Petitioner advances the argument that Hurst v. Florida, 136 S. Ct. 616 (2016) was the triggering event for filing the instant Writ, because Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) did not advance his claim. Such argument rests on the basis that Ring dealt with eligibility for the death sentence, but failed to rule upon the selection component of a death penalty sentencing. Petitioner asserts that Hurst's rationale is much broader than Ring, as Ring stands for the reasoning that juries are required to make all requisite findings of fact in a death penalty case. This Court finds such argument unpersuasive.

Hurst does not stand for the proposition that appellate reweighing is unconstitutional; rather it only found unconstitutional instances where a judge alone found the existence of an aggravating circumstance. Hurst does not expand Ring and does not cure the procedural bars set forth by the State of Nevada, as the entirety of the United States Supreme Court's decision in Hurst focused on applying the decision of Ring to Florida's "advisory jury" function utilized for the imposition of death. Therefore, because Hurst is only an application of Ring with no additional points of law relevant to the instant case, no good cause exists to overcome the asserted statutory bars.

Therefore, based on the above reasoning, Petitioner's 5th Petition is procedurally barred and requires mandatory dismissal pursuant to NRS 34.726. NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the Supreme Court issues its remittitur and must be strictly construed." *See* State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("application of the statutory procedural default rules to post-conviction habeas petitions is mandatory"). Even if this Court accepted the fact that the one year rule didn't start to run until Petitioners challenge to the Nevada Supreme Court's reweighing decision, the Fifth Petition is still time barred. While Hurst was published in 2016, the reasoning and law of Hurst was a simple application of Ring and therefore was fully known to Petitioner in 2002. The remittitur issued from the Nevada Supreme

Court invalidating an aggravating circumstance and reweighing was decided on 10/20/14 and filed 10/24/14. Therefore, even under the most favorable analysis possible, Petitioner had until 10/20/15 to bring forth the instant challenge against the Nevada Supreme Court's reweighing decision and by failing to do so, such claim is waived.

The COURT FURTHER FINDS NRS 34.810 also bars the instant Petition. NRS 34.810(2) states a Court shall dismiss a petition if the court determines the grounds for the petition could have been raised on direct appeal or a prior petition for post-conviction relief. NRS 34.810(2). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or is barred. Here, Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as it was not raised within one year of when it was available to him. As expressed above, even if this Court accepts Petitioner's argument, the claim is barred based on the fact the United States Supreme Court published Ring on 6/24/2002. Therefore, under even the most favorable review, Petitioner had until 10/20/2015 to bring a "Ring challenge" against the reweighing decision and failed to do so, thereby waiving such claim.

Therefore, COURT ORDERED Petition for Writ of Habeas Corpus DENIED. The State is directed to submit a formal Findings of Fact, Conclusions of Law and Order within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21. Such Order should set forth a synopsis of the supporting reasons proffered to the Court in briefing.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of the District Attorney and Paola Armeni, Esq..//ob/05/02/17.