IN THE SUPREME COURT OF THE STATE OF NEVADA

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Electronically Filed
Feb 12 2018 11:07 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

WILLIAM P. CASTILLO, Petitioner/Appellant, v. TIMOTHY FILSON, et al., Respondents/Appellees.	Supreme Court No. 73465 District Court Case No. C133336-1 (Death Penalty Case)

APPELLANT'S APPENDIX

Appeal From
Eighth Judicial District Court, Clark County
The Honorable William D. Kephart, District Judge

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Federal Public Defender

BRAD D. LEVENSON
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Attorneys for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 12, 2018. Electronic Service of the foregoing APPELLANT'S APPENDIX shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney
Steven.owens@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender
District of Nevada

VER

FILED IN OPEN COURT
SEP 25 1996 4:47pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

VERDICT

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

____ A definite term of 50 years imprisonment, with eligibility for parole beginning when a minimum of 20 years has been served,

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

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

__✓__ Death.

DATED at Las Vegas, Nevada, this 25 day of September, 1996

[signature]
FOREPERSON
JOHN R. RUHLMANN

CE31

2101

INST

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

INSTRUCTIONS TO THE JURY

(INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

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

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

2074

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.

[redacted]

2075

INSTRUCTION NO. 3

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

2076

INSTRUCTION NO. 4

The jury shall fix the punishment at:

(1) A definite term of 50 years imprisonment, with eligibility for parole beginning when a minimum of 20 years has been served,

(2) Life imprisonment with the possibility of parole,

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

(4) Death.

2077

INSTRUCTION NO. 5

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

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

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

Furthermore, any person who uses a deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed for the primary offense. The deadly weapon enhancement runs consecutively with the sentence imposed for the primary offense.

Therefore, any punishment the jury imposes will be doubled at the time of formal sentencing because of the deadly weapon enhancement.

INSTRUCTION NO. 6

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

Hearsay is admissible in a penalty hearing.

INSTRUCTION NO. 7

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

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

It shall be your duty to determine:

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

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

(c) Based upon these findings, whether a defendant should be sentenced to a definite term of 50 years imprisonment, life imprisonment or death.

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

A mitigating circumstance need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Otherwise, the punishment shall be imprisonment in the State Prison for a definite term of 50 years imprisonment, with eligibility for parole beginning when a minimum of 20 years has served or life with or without the possibility of parole.

2080 [redacted]

INSTRUCTION NO. 8

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

2081

[redacted]

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 person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Attempted Residential Burglary committed on 12-19-90, victim Marilyn Mills. Judgment of Conviction filed 6-7-91, Case No. C99212X, Clark County, Nevada.

2. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Robbery committed on 12-14-92, Victim Patricia Rizzo. Judgment of Conviction filed 5-28-93, Case No. C111011, Clark County, Nevada.

3. The murder was committed by WILLIAM PATRICK CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Burglary and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

4. The murder was committed by WILLIAM CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Robbery and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest.

2082 [redacted]

INSTRUCTION NO. 10

Any person who by day or night, enters any home or building with intent to commit larceny or any felony, is guilty of Burglary.

2083

INSTRUCTION NO. 11

Larceny is the theft of money or property belonging to another person.

INSTRUCTION NO. 12

You are instructed that the offense of Burglary is complete if you find that entry was made into a home or building with the intent to commit Larceny or any felony therein.

An entry is deemed to be complete when any portion of an intruder's body, however slight, penetrates the space within the building.

2085

INSTRUCTION NO. 13

You are further instructed that in order to constitute the crime of burglary, it is not necessary to prove that the defendant actually stole any of the articles, goods or money contained in the home or building. The gist of the crime of burglary is the unlawful entering of a building with the intent to steal something therein.

INSTRUCTION NO. 14

Robbery is the unlawful taking of personal property from the person of another, or in her presence, against her will, by means of force or violence or fear of injury, immediate or future, to her person or property, or the person or property of a member of her family, or of anyone in her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

(a) Obtain or retain possession of the property;

(b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A 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. 15

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.

INSTRUCTION NO. 16

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

1. The youth of the Defendant at the time of the crime.

2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

3. Any other mitigating circumstances.

INSTRUCTION NO. 17

The burden rests upon the prosecution to establish any aggravating circumstance beyond a reasonable doubt and you must be unanimous in your finding as to each aggravating circumstance.

2090

INSTRUCTION NO. 18

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

INSTRUCTION NO. 19

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

INSTRUCTION NO. 20

Evidence of a defendant's past conduct from which a reasonable inference can be drawn that even incarceration will not deter the defendant from endangering others lives, is a factor you may consider in determining the appropriate penalty.

2093

WCastillo - 027-8JDC0611

INSTRUCTION NO. 21

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

Castillo, William
Rcv'd 10/20/04 8JDC-612
8th JDC recs.

2094

INSTRUCTION NO. 22

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

2095

INSTRUCTION NO. 23

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.

2096

INSTRUCTION NO. 24

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 except with regard to any findings you may make as to the existence of individual mitigating circumstances. When you have agreed upon your verdicts, they should be signed and dated by your foreperson.

INSTRUCTION NO. 25

The Court has submitted two sets of verdicts to you. One set of verdicts reflects the four possible punishments which may be imposed. The other 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 or circumstances and any mitigating circumstances.

2098

INSTRUCTION NO. 26

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

Given: A. William Maupin
9/24/96 IN OPEN COURT

2099 [redacted]

VER

FILED IN OPEN COURT
SEP 25 1996 19 4:47pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

SPECIAL

VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM PATRICK CASTILLO, Guilty of COUNT IV - MURDER OF THE FIRST DEGREE, designate that the mitigating circumstance or circumstances which have been checked below have been established.

✓ The youth of the defendant at the time of the crime.

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

✓ Any other mitigating circumstances.

____ No mitigating circumstances are found to exist.

DATED at Las Vegas, Nevada, this 25 day of September, 1996.

FOREPERSON JOHN R. RUHLMANN

2106

CE31

CASTILLO

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

SPECIAL

VERDICT

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

____ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Attempted Residential Burglary committed on 12-19-90, victim Marilyn Mills. Judgment of Conviction filed 6-7-91, Case No. C99212X, Clark County, Nevada.

✓ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Robbery committed on 12-14-92, Victim Patricia Rizzo. Judgment of Conviction filed 5-28-93, Case No. C111011, Clark County, Nevada.

2103

✓ The murder was committed by WILLIAM PATRICK CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Burglary and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

✓ The murder was committed by WILLIAM CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Robbery and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

✓ The murder was committed to avoid or prevent a lawful arrest.

DATED at Las Vegas, Nevada, this 25 day of September, 1996.

FOREPERSON
JOHN R. RUHLMANN

2104

PWHC
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Attorneys for Petitioner

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, v. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Nevada Attorney General, Respondents.	Case No. C-133336 Dept. No. XIX Hearing Date: Hearing Time: **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** (Death Penalty Habeas Corpus Case)

Petitioner William P. Castillo hereby files this Petition for Writ of Habeas Corpus (Post-Conviction) pursuant to Nevada Revised Statutes sections 34.724 and

34.820. Castillo alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America; Article 1, sections Three, Six, Eight, and Nine and Article 4, section Twenty-one of the Constitution of the State of Nevada; and the rights afforded to him under federal law enforced under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI.

DATED this 6th day of January, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

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

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Defendant

PLEASE TAKE NOTICE that the "PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)" filed January 6th, 2017 will be heard on the 6 day of March, at the hour of 8:30am a.m./p.m., in Department XIX of the District Court.

DATED this 6th day of January, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Brad D. Levenson

BRAD D. LEVENSON
Assistant Federal Public Defender

PROCEDURAL ALLEGATIONS

1. Petitioner William P. Castillo is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and death sentence. Respondent Timothy Filson, is the Warden of Ely State Prison. Castillo's conviction and sentence were entered on November 4, 1996, in the Eighth Judicial District Court of Clark County, Nevada.

2. On January 11, 1996, a Clark County, Nevada grand jury indicted Castillo and his co-defendant, Michelle C. Platou, for: (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is sixty-five years of age or older; (4) first-degree murder with use of a deadly weapon; (5) conspiracy to commit burglary and arson; and (6) first-degree arson. NRS 193.165; 193.167; 199.480; 200.010; 200.030; 205.010; 205.060; 200.380. On January 19, 1996, Clark County prosecutors filed the indictment in open court.

3. On January 23, 1996, the State filed their "Notice of Intent to Seek Death Penalty." The notice identified five aggravating factors which prosecutors intended to prove at Castillo's penalty phase of trial.

4. On January 24, 1996, Castillo pled not guilty to all charges. On May 29, 1996, prosecutors filed an amended indictment which alleged the same offenses as the original indictment but adding an additional burglary charge.

5. On August 26, 1996, jury selection began. Jury selection was completed on August 28, 1996.

6. On August 28, 1996, Castillo's trial began, and on September 4, 1996, the jury found him guilty of: (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is sixty-five years of age or older; (4) first-degree murder with use of a deadly weapon; (5) conspiracy to commit burglary and arson; and (6) first-degree arson.

7. Castillo did not testify either in the guilt or penalty phases of his trial.

8. On September 19, 1996, Castillo's penalty phase trial began. On September 25, 1996, the jury sentenced Castillo to death. The jury found four aggravating factors: (1) Castillo committed the murder after he was previously convicted of a violent felony, to wit: the robbery he committed on December 14, 1992; (2) Castillo committed the murder while engaged in a burglary; (3) Castillo committed the murder while engaged in a robbery; and (4) Castillo committed the murder to avoid or prevent his lawful arrest. The jury found three mitigating factors: (1) Castillo's youth at the time of the offense; (2) Castillo committed the murder while he was under the influence of extreme mental or emotional disturbance; and (3) any other mitigating factors.

9. On September 25, 1996, Castillo's co-defendant pled guilty to burglary, robbery, and first-degree murder.

10. On November 4, 1996, Castillo received the following sentence: 72 months for conspiracy to commit burglary; 120 months for burglary; 180 months for robbery with the victim being over the age of 65 years with 180 months for use of a deadly weapon; 72 months for conspiracy to commit burglary and arson; 120 months

for burglary; 180 months for first-degree arson; and death for first-degree murder with a deadly weapon. All sentences were to be served consecutively.

11. On November 4, 1996, Castillo filed a timely notice of appeal.

12. On March 12, 1997, Castillo filed an opening brief in the Nevada Supreme Court. On April 2, 1998, the Nevada Supreme Court affirmed Castillo's convictions and death sentence. See Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). Castillo's petition for rehearing was denied on November 25, 1998.

13. On January 25, 1999, Castillo filed a petition for certiorari with the United States Supreme Court. The petition was denied on March 22, 1999. See Castillo v. Nevada, 526 U.S. 1031 (1999).

14. On April 2, 1999, Castillo filed a petition for writ of habeas corpus in the Eighth Judicial District Court. On October 12, 2001, Castillo filed a supplemental brief in support of the petition for writ of habeas corpus. The following issues were raised:

1. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Nevada Revised Statute section 193.165(5) is unconstitutionally vague and ambiguous.

5. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case.

6. The district court erred in failing to hold a requested evidentiary hearing to permit Castillo to establish facts outside of the record.

7. Castillo is entitled to a new trial and penalty hearing based upon the failure of trial counsel to present a psychological defense at the trial phase of the case.

8. Castillo's conviction is unconstitutional because of cumulative error.

9. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment.

10. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments.

11. Castillo's conviction and sentence are invalid pursuant to the rights and protections afforded him under the International Covenant on Civil and Political Rights.

12. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable

> sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner.

15. On May 8, 2002, the state court granted a limited evidentiary hearing for the sole purpose of investigating Castillo's claims of ineffective assistance of counsel. A limited hearing was held on August 2, 2002. After the evidentiary hearing, supplemental briefing was ordered.

16. On September 27, 2002, Castillo filed a second supplemental brief where the following three issues were raised:

> 1. Castillo was denied due process of law at the penalty hearing wherein the prosecutor asked the jury to vote against Castillo and in favor of future innocent victims pursuant to the jury's duty.
>
> 2. Castillo received ineffective assistance of trial and appellate counsel who failed to object to the bad character evidence which was improperly raised in front of the jury.
>
> 3. Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

17. On June 11, 2003, the court denied Castillo's petition and filed Findings of Fact, Conclusions of Law and Order. Castillo filed a timely notice of appeal.

18. On October 2, 2003, Castillo's opening brief to the Nevada Supreme Court was filed, raising ten issues:

> 1. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Castillo received ineffective assistance of counsel wherein trial and appellate counsel failed to object to the bad character evidence which was improperly raised in front of the jury.

5. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case and Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

6. Castillo's conviction is unconstitutional because of cumulative error.

7. Castillo's death sentence is invalid because the death penalty is cruel and unusual punishment.

8. Castillo's death sentence is invalid because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments.

9. Castillo's conviction and death sentence are invalid pursuant to the rights and protections afforded to him under the international covenant on civil and political rights.

10. Castillo's death sentence is invalid because the Nevada capital punishment system operates in an arbitrary and capricious manner.

19. On February 5, 2004, the Nevada Supreme Court affirmed the denial of post-conviction relief.

20. On May 5, 2004, Castillo submitted his petition for certiorari to the United States Supreme Court, which the Court denied on October 4, 2004. See Castillo v. Nevada, 543 U.S. 879 (2004).

21. On June 22, 2004, Castillo filed a pro se petition for writ of habeas corpus in the federal district court. Castillo v. Filson, Case No. 2:04-cv-00868-RCJ-GWF, Docket No. 1 (D. Nev. 2004). On July 7, 2004, the Court appointed the Federal Public Defender's Office to represent Castillo. Id. at Docket No. 6. On December 15, 2008, Castillo filed an amended petition for writ of habeas corpus and exhibits. Id. at Docket No. 70 (D. Nev. 2008). That petition raised the following claims:

1. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Castillo's death sentence is invalid because of improper re-weighing.

3. Castillo's death sentence is invalid because of unconstitutional jury instructions.

4. Castillo's death sentence is invalid because of the use of unconstitutional use of juvenile convictions.

5. Castillo's death sentence is invalid because of the confrontation violation.

6. Castillo's death sentence is invalid because unconstitutional use of alleged white supremacy beliefs.

7. Castillo's death sentence is invalid because of injurious effect of prosecutorial misconduct and overreaching.

8. Castillo's death sentence is invalid because prosecutors introduced victim impact testimony which was so unduly prejudicial it rendered Castillo's trial fundamentally unfair.

9. Castillo's death sentence is invalid because the trial judge allowed the prosecutor to elicit testimony of Castillo's other criminal acts despite a pretrial ruling to exclude such testimony.

10. Castillo's death sentence is invalid because of the unrecorded bench conferences.

11. Castillo's death sentence is invalid due to unconstitutionally vague deadly weapon enhancement.

12. Castillo's death sentence is invalid due lack of use of deadly weapon finding.

13. Castillo's death sentence is invalid because of unconstitutional lethal injection protocol.

14. Castillo's death sentence is invalid because of restrictive death row conditions.

15. Castillo's death sentence is invalid because of elected judges and impartiality.

16. Castillo's death sentence is invalid because the death penalty is cruel and unusual punishment.

17. Castillo's death sentence is invalid because executing the mentally ill is unconstitutional.

18. Castillo's death sentence is invalid because of non-statutory mitigating circumstances.

19. Castillo's death sentence is invalid because of cumulative error.

22. On September 18, 2009, Castillo filed a petition for writ of habeas corpus in the state court. On September 22, 2009, Castillo filed a motion for stay and abeyance to allow him to return to state court and exhaust claims. Id. at Docket No. 98 (D. Nev. 2009). On January 21, 2010, the Court granted Castillo's motion and stayed the federal action. Id. at Docket No. 106 (D. Nev. 2010).

23. On May 21, 2010, the state district court denied Castillo's petition. On July 18, 2013, the Nevada Supreme Court affirmed the denial of Castillo's successor habeas petition. On November 22, 2013, the Nevada Supreme Court struck two of the aggravating circumstances, conducted appellate reweighing, and determined that Castillo would still have received a death sentence. Ex. 1. The court then denied Castillo's petition for rehearing. Ex. 2.

24. On December 16, 2013, Castillo filed a motion to lift the stay and reopen the federal capital habeas proceeding. Id. at Docket No. 118 (D. Nev. 2013). On January 10, 2014, the Court granted Castillo's motion. Id. at Docket No. 120 (D. Nev. 2014.

25. On May 19, 2014, Castillo filed his second amended petition for writ of habeas corpus. Id. at Docket No. 126. That petition raised the same nineteen claims as he did in the previously filed petition.

26. On March 2, 2016, the Court granted in part and denied in part respondent's motion to dismiss the second amended petition. Id. at Docket No. 184 (D. Nev. 2016).

27. The State filed their Answer on August 1, 2016. Id. at Docket No. 189. Castillo filed his response to the State's Answer on December 23, 2016. Id. at Docket No. 195.

STATEMENT WITH RESPECT TO CLAIMS RAISED IN THE INSTANT PETITION

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

Claim Two is being raised in this petition because it shows that Castillo is actually innocent of the death penalty. See Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

PRIOR COUNSEL

The attorneys who previously represented Castillo were:

a. Arraignment and Plea:
Peter LaPorta

b. Trial, Guilt and Penalty and Sentencing:
Peter La Porta and David Schieck

c. Direct Appeal:
David Schieck

d. Post-Conviction:
Christopher Oram

e. Post-Conviction Appeal:
Christopher Oram

GROUNDS FOR RELIEF

Castillo hereby asserts the following grounds for relief. References in this Petition to the accompanying exhibits incorporate the contents of the exhibit as if fully set forth herein. References to one claim within another claim incorporate all of the arguments contained within the incorporated claim as if fully set forth therein.

CLAIM ONE:

Castillo's death sentence is invalid under the state federal constitutional guarantees of due process, equal protection, a reliable sentence, and a jury trial, because the Nevada Supreme Court reweighed his eligibility for the death penalty by substituting the decision of the appellate court for the decision of the jury, and by failing to find the condition of eligibility beyond a reasonable doubt. U.S. Const. amends. V, VI, VIII, XIV; Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution.

SUPPORTING FACTS

1. In the last state post-conviction appeal, the Nevada Supreme Court found Castillo eligible for the death penalty by finding the mitigation evidence presented at trial was outweighed by two statutory aggravating circumstances. The jury that sentenced Castillo to death weighed four statutory aggravating circumstances against the mitigation evidence. The Nevada Supreme Court found two of the statutory aggravating factors regarding the circumstances of the offense invalid. See Exs. 1, 2. However, instead of reversing the death sentence so a jury could make the constitutionally-required finding beyond a reasonable doubt regarding whether mitigation evidence outweighed the two remaining statutory

aggravating circumstances, the Nevada Supreme Court made that finding itself. The state court violated Castillo's right to a jury trial by substituting its own judgment regarding his eligibility for the death penalty for that of the jury.

2. In Nevada, a finding that mitigation evidence does not outweigh statutory aggravating circumstances is a condition precedent to the jury's ability to consider the death penalty as a sentencing option. NRS 175.554(3), 200.030(4). Only after the jury makes this factual finding is it permitted to consider death as the appropriate sentence. After finding the defendant death eligible, the jury is permitted to consider other matter evidence regarding the defendant's character and to decide whether death is the appropriate punishment. NRS 175.552(3). Unlike other state capital sentencing schemes where the jury considers intangible factors (such as mercy) during the selection weighing process, the eligibility weighing process in Nevada is a factual determination. The weighing of mitigation against statutory aggravating circumstances therefore exposes Castillo to a sentence in excess of the statutory maximum for first-degree murder, and that finding must be made by a jury.

3. The Sixth Amendment jury trial right prevents the Nevada Supreme Court from conducting its own fact-finding in order to uphold Castillo's death sentence. The Nevada Supreme Court has a practice of conflating reweighing of a death sentence after striking an invalid aggravating circumstance with harmless error review. State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682 (2003) (citing Clemons v. Mississippi, 494 U.S. 738 (1990)). Reweighing is fundamentally different than harmless error review because it involves the appellate court making its own

determination with respect to the weight that should be given to the statutory aggravating circumstances and the mitigation. In light of the significant changes in the United States Supreme Court's Sixth Amendment jurisprudence that existed at the time the Nevada Supreme Court upheld Castillo's death sentence, appellate reweighing after striking an invalid aggravating circumstance violates Castillo's right to a jury trial. The part of Clemons that permits appellate reweighing is therefore no longer good law.

4. The Nevada Supreme Court improperly conducting reweighing of Castillo's death sentence after striking two invalid aggravating circumstances. The court's decision shows it phrased its analysis in terms of "reweighing" consistent with its practice under Haberstroh. The Nevada Supreme Court further acknowledged it was reweighing given the absence of a special verdict form by the jury designating the mitigation found by individual jurors. (jury's designation of "other mitigating circumstances" "may have included that Castillo admitted guilt, demonstrated remorse, cooperated with police, did not plan the murder, and had a difficult childhood"). The Nevada Supreme Court made it clear the death eligibility determination was being made by the court: "Considering these mitigating circumstance and the remaining valid aggravating circumstances, we are confident that the jury would have concluded that the mitigating circumstances did not outweigh the valid aggravating circumstances." This "finding" was different than the one made in the following sentence where the court found harmless error as to the selection phase of the trial. (finding "beyond a reasonable doubt that the jury would

have returned a death sentence . . . ."). The difference in the phrasing by the Nevada Supreme Court between the eligibility finding and the selection finding shows the court conducted reweighing as to the former finding.

5. The Nevada Supreme Court also violated Castillo's constitutional rights by failing to find the outweighing element beyond a reasonable doubt. The sentencing jury was not instructed it had to find the outweighing element beyond a reasonable doubt. Likewise, the Nevada Supreme Court's decision in the second post-conviction appeal shows that it did not purport to find the outweighing element beyond a reasonable doubt. Federal law requires that all factual findings exposing Castillo to a sentence in excess of the statutory maximum must be found beyond a reasonable doubt. The failure of the jury and the Nevada Supreme Court to make that finding violated Castillo's due process and jury trial rights.

6. Any error with respect to the constitutionally-required proof beyond a reasonable doubt standard constitutes structural error, and is prejudicial per se.

7. Moreover, the Nevada Supreme Court's reweighing of Castillo's death sentence was not harmless beyond a reasonable doubt. Unlike an appellate court reviewing a cold record, a jury sees the defendant, hears the sound of his voice, and considers his post-crime incarceration. Unlike an appellate court, a jury must consider all available mitigation evidence regardless of when it was discovered. Given these fundamental differences between a jury and an appellate court, there is grave doubt regarding the prejudicial effect of the error, and Castillo's death sentence must be vacated.

CLAIM TWO:

Castillo's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the Nevada Supreme Court's arbitrary and capricious application of the avoid or prevent lawful arrest aggravating circumstance in his case, and due to the insufficiency of the evidence to support the aggravating circumstance. U.S. Const. amends V, VI, VIII, XIV; Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution

SUPPORTING FACTS

1. The sentencing jury in Castillo's case found as an aggravating circumstances that the murder was committed to avoid or prevent lawful arrest. The notice of intent to seek the death penalty alleged the facts supporting the aggravating factor "will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself." Castillo did not receive any other form of notice from the State before trial of the facts allegedly supporting the factor.

2. There was no evidence admitted at the penalty hearing to support the aggravating circumstance other than that Castillo purportedly committed the killing while in the commission of a robbery and a burglary. As explained more fully below, there was constitutionally insufficient evidence to support the avoid or prevent lawful arrest aggravating circumstance in Castillo's case when there were no facts other than felony murder to support the factor.

3. The aggravating factor defined by NRS 200.033(5) is impermissibly vague and overbroad. It provides no rational standards for its application to law

enforcement, prosecutors, or sentencing bodies, and no adequate notice to defendants, because it requires no temporal or other factual relationship between the homicide and the "lawful arrest" the homicide is intended to "avoid or prevent."

4. The aggravating factor of NRS 200.033(5), as applied by the Nevada courts, violates the constitutional rule of lenity and the due process protection against ex post facto application of statutes, by imposing liability on the basis of an unanticipated and irrational broadening of the statutory language to apply to homicides occurring in the absence of an actual and identifiable "lawful arrest" which the homicide was committed to "avoid or prevent."

5. The aggravating factor of NRS 200.033(5), as applied by the Nevada courts, does not supply any rational distinction in culpability sufficient to justify imposition of the death penalty, because it does not require any factual nexus between the lawful arrest and homicide. It therefore does not rationally narrow the class of homicides for which the death penalty may be imposed. As applied in Castillo's case, the aggravating circumstance is inherent in every felony murder and, therefore, the aggravating circumstance fails to genuinely narrow the class of defendants eligible for the death penalty. The prosecutor's argument in closing that the absence of justification for the killing supported the aggravating circumstance likewise failed to provide the required narrowing functioning because the absence of justification is inherent in the finding of malice.

6. The "avoiding arrest" aggravating factor violates the presumption of innocence and the due process requirement that the State shoulder the burden of

proving the elements of the charged offense. As applied by the Nevada courts, it does not require any evidence of motive at all, and allows the state to shift the burden to the defendant of showing some motive other than avoiding arrest. Without the necessity of proving any particular facts, the burden of proof is effectively shifted to the Castillo to prove that the motive for the killing was not to avoid or prevent lawful arrest.

7. The avoid or prevent lawful arrest factor was arbitrarily applied by the state courts in Castillo's case. The Nevada Supreme Court has noted it is improper for the State to allege the factor in circumstances where there are no facts other than ordinary murder to sustain it. Bennett v. Eighth Judicial District Court, 121 Nev. 802, 806, 121 P.3d 605, 608 (2005). Consistent with this position, a search of Westlaw reveals fifty-one published Nevada Supreme Court decisions specifying that one of the aggravators found by the sentencer was murder committed during the course of a felony. Of those cases, the avoid or arrest aggravating factor was alleged by the State and found by the sentence in eight cases. Of those eight cases, the factor was found because there was a pre-existing relationship between the defendant and the victim such that the victim could have identified the defendant. In only one case – Castillo's – was there no evidence to support a finding that the murder was specifically committed to avoid or prevent lawful arrest. The arbitrary and capricious application of the aggravating circumstance here violated Castillo's right to a reliable sentence and to constitutionally-adequate appellate review.

8. The jury's finding of the invalid avoid or prevent lawful arrest aggravating circumstance was prejudicial at sentencing and was also prejudicial as the Nevada Supreme Court's prior decisions affirming the sentence. The procedural posture of this case is radically different than the one before the jury which imposed the original sentence. Setting aside the avoid or prevent lawful arrest factor, the jury had only one remaining statutory aggravating circumstance, i.e., a prior robbery conviction, to weigh against all of the mitigation evidence. The remaining aggravating circumstance does not have significant weight as no one was physically harmed during offense that gave rise to the prior conviction. Weighing that conviction against the compelling mitigation evidence in this case shows that the State will not be able to prove that the constitutional error was harmless beyond a reasonable doubt.

CLAIM THREE:

Castillo's death sentence is invalid under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution because the jury in his capital trial was not instructed that in order to find Castillo eligible for the death penalty, it must first find that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt.

SUPPORTING FACTS

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

2. Castillo's jury was instructed in the penalty phase that the findings of aggravating circumstance had to be made beyond a reasonable doubt. See Penalty Instruction No. 7. The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt.

3. The weighing process performed by the sentencer is entirely idiosyncratic; the weighing process does not depend on the number of aggravating or mitigating circumstances; the jury may give any circumstance whatever weight it

determines is appropriate. No entity other than the jury can perform the necessary weighing, and the failure to instruct the jury on the standard by which it was required to find this death-eligibility factor is prejudicial per se.

4. Failure to instruct the jury on the burden of proof beyond a reasonable doubt violated Castillo's right to a jury trial, due process of law, and a reliable sentence, and constitutes structural error which is prejudicial per se. In the alternative, the failure of the jury instruction to require that mitigating circumstances are not outweighed by aggravating circumstances beyond a reasonable doubt was prejudicial, and the State cannot prove beyond a reasonable doubt that the error was harmless.

PRAYER FOR RELIEF

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

DATED this 6th day of January, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

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

VERIFICATION

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

DATED this 6th day of January, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender,
District of Nevada

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

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

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(b)(6), the undersigned hereby certifies that on the 6th day of January, 2017, a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was filed electronically with the Eighth Judicial District Court and served by depositing same in the United States mail, first-class postage prepaid, addressed as follows:

Hector Procter
Senior Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701

Timothy Filson
Warden, Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Steven S. Owens
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

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

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56176

FILED

JUL 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant William P. Castillo's second post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

A jury convicted Castillo of first-degree murder with the use of a deadly weapon and six other felonies in the killing of Isabelle Brendt. The jury sentenced Castillo to death, and this court affirmed the conviction and sentence. *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998). Castillo unsuccessfully sought relief in a prior post-conviction proceeding. *Castillo v. State*, Docket No. 40982 (Order of Affirmance, February 5, 2004). Castillo filed the instant petition in the district court on September 18, 2009. The district court denied the petition as procedurally barred, and this appeal followed.

Castillo argues that the district court erred by denying his petition as untimely and successive without conducting an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984) (concluding that to warrant an evidentiary hearing, a petitioner must

raise claims that are supported by specific factual findings that are not belied by the record and, if true, would entitle him to relief). He further contends that even if he cannot demonstrate good cause to overcome the applicable procedural bars, the district court erred by denying his petition because the failure to consider it on the merits resulted in a fundamental miscarriage of justice.

Procedural bars

Because Castillo filed his petition ten years after the remittitur issued in his direct appeal, *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998), the petition was untimely under NRS 34.726(1). The petition was also successive because he previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.[1] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). The petition was therefore procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default-rules, Castillo advances three arguments: (1) his first post-conviction counsel was ineffective; (2) the inconsistent and discretionary application of procedural bars prohibits their use to deny him relief; and (3) any delay was not his fault.

Ineffective assistance of first post-conviction counsel

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[1]*Castillo v. State*, Docket No. 40982 (Order of Affirmance, February 5, 2004).

Castillo argues that the district court erred by denying his petition as procedurally barred because his first post-conviction counsel was ineffective for failing to adequately investigate mitigation evidence presented at the penalty phase. While post-conviction counsel's ineffectiveness may constitute good cause to file claims in an untimely and successive petition, those claims are subject to NRS 34.726(1), *State v. Eighth Judicial District Court (Riker)*, 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); *Pellegrini v. State*, 117 Nev. 860, 869-78, 34 P.3d 519, 525-31 (2001), and must be raised within a reasonable time after they become available, *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Here, Castillo's post-conviction-counsel claims became available, at the latest, once this court resolved the appeal from the denial of his first post-conviction petition. Yet, he waited nearly five years after the remittitur issued from that appeal to file the instant petition. Therefore, his claims of ineffective assistance of post-conviction counsel are procedurally barred and cannot serve as good cause for the delay in filing his petition. *See Stewart v. LaGrand*, 526 U.S. 115, 120 (1999) (concluding that ineffective-assistance-of-counsel claim failed as good cause because the ineffective-assistance claim was itself procedurally defaulted); *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 ("[T]o constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted."); *Riker*, 121 Nev. at 235, 112 P.3d at 1077; *Pellegrini*, 117 Nev. at 869-70, 34 P.3d at 526. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Challenge to the application of the procedural bars

Castillo argues that the district court erred by denying his post-conviction petition as procedurally barred because the default rules are discretionary and this court inconsistently applies them. Contrary to Castillo's argument, we have held that procedural-default rules are mandatory, *see Clem v. State*, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); *Pellegrini*, 117 Nev. at 886, 34 P.3d at 536, and have rejected claims that we have discretion to ignore them, *Riker*, 121 Nev. at 236, 238-39, 112 P.3d at 1077, 1079. Similarly, we have rejected claims that we inconsistently apply procedural default rules. *Id.* at 236, 112 P.3d at 1077. Even assuming any inconsistent application, we have rejected claims that any prior inconsistency excuses procedural default in other cases. *Id.* Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Fault

Castillo argues that the district court erred by denying his petition as procedurally barred because NRS 34.726 does not apply to him, as the delay in filing the petition was not his fault but rather counsel's. In this, he contends that the plain language of NRS 34.726(1) evinces the Legislature's intent that petitioner himself must act or fail to act to cause delay. We reject Castillo's interpretation. We have held that NRS 34.726 requires "a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. This language contemplates that the delay in filing a petition must be caused by a circumstance not within the actual control of the defense team as a whole, not solely the defendant. Accepting Castillo's interpretation ascribes a

meaning to this statute not contemplated by the Legislature and would eviscerate NRS 34.726—as long as the defendant is represented by counsel (appointed or retained), the defendant would have good cause to file an untimely petition. Moreover, even if we accepted Castillo's construction of NRS 34.726(1), he waited nearly five years after this court resolved his appeal concerning his first post-conviction petition to file the instant petition, and the only explanation for the delay is that he was seeking relief in federal court. The election to go to federal court prior to pursuing state remedies does not provide good cause to excuse the procedural bars. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Further, Castillo's claim that *Colley* should not apply to him because he suffers from neurological and psychological disorders is not persuasive for two reasons. First, Castillo filed his prior petition in proper person, and he fails to demonstrate why his alleged neurological and psychological disorders prevented him from filing his second petition in the same manner. Second, Castillo has been continuously represented by counsel since at least 2004, and he fails to demonstrate how his alleged neurological and psychological disorders prevented counsel from filing the petition in a timely manner. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Fundamental miscarriage of justice

Castillo argues that even if he cannot demonstrate good cause to overcome the procedural bars, the district court's failure to consider his post-conviction petition on the merits resulted in a fundamental miscarriage of justice because he is actually innocent of first-degree murder under this court's decision in *Byford v. State*, 116 Nev. 215, 994

P.2d 700 (2000), regarding the first-degree murder instruction.[2] We disagree. In *Byford*, this court disapproved of the commonly-known *Kazalyn*[3] instruction and provided the district courts with instructions to use in the future. *Id.* at 233-37, 994 P.2d at 712-15. However, we concluded in *Nika v. State*, that *Byford* does not apply to cases that were final when it was decided. 124 Nev. 1272, 1276, 198 P.3d 839, 842 (2008). Castillo's conviction was final before *Byford* was decided and therefore *Byford* does not apply.

Castillo acknowledges *Nika* but argues that the decision ignores the constitutional vagueness arguments attendant to the *Kazalyn* instruction and failed to determine whether *Byford* should apply retroactively as a substantive rule of criminal law. We disagree. Until *Byford*, this court consistently upheld the *Kazalyn* instruction and rejected constitutional challenges similar to Castillo's. *Byford* did not alter the law in effect when Castillo's conviction became final; rather, it changed the law prospectively. And because that change concerned a matter of state law, the *Byford* decision did not implicate federal constitutional concerns.

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[2]Castillo also appears to argue that it would be a fundamental miscarriage of justice if this court did not consider his claim that if the additional mitigation evidence presented in the post-conviction proceedings had been presented at trial, the jury would have concluded that the mitigation evidence would have outweighed the aggravating circumstances and he would not have been sentenced to death. However, this claim is conclusory and not sufficiently developed to warrant relief. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[3]*Kazalyn v. State*, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

Further, Castillo's claim that the use of the *Kazalyn* instruction in this case resulted in a fundamental miscarriage of justice because the jury would have found him guilty of second-degree murder rather than first-degree murder lacks merit. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Castillo's claim relating to the jury instructions is not a claim regarding factual innocence and he fails to demonstrate that, had the jury not received the *Kazalyn* instruction, "'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'" *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *accord Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Beyond those hurdles to his actual-innocence claim, the underlying idea that Castillo would not have been convicted of first-degree murder but for the *Kazalyn* instruction is fundamentally flawed. Castillo was charged with first-degree murder based on two theories: that the murder was committed in the perpetration or attempted perpetration of two felonies (burglary and robbery) and that the murder was willful, deliberate, and premeditated. The evidence supported a conclusion that Castillo murdered Berendt during the perpetration of a burglary and robbery, and he was convicted of burglary and robbery. The evidence also supported a finding that the murder was premeditated and deliberate—Castillo entered Berendt's home with a tire iron, hit the sleeping 86-year-old woman with the tire iron, and then smothered her with a pillow. Because there was substantial evidence that Castillo was guilty of first-

degree murder under both the felony-murder theory and premeditation theory, he could not demonstrate even legal innocence based on the *Kazalyn* instruction. Therefore, the district court did not err in denying this claim without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

[4]The Honorable Nancy Saitta voluntarily recused herself from participation in the decision of this matter.

cc: Hon. David B. Barker, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56176

ORDER DENYING REHEARING

Appellant William Castillo has filed a petition for rehearing of the court's order affirming the district court's denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. *Castillo v. State*, Docket No. 56176 (Order of Affirmance, July 18, 2013). Although we deny rehearing, Castillo's claim that this court overlooked his argument that he was actually innocent of the death penalty warrants further discussion.

Castillo argues that two of the four aggravating circumstances found in the penalty phase were invalid based on *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and that if this court reweighed and considered all of the mitigation evidence that should have been presented to the jury, he would be actually innocent of the death penalty and his death sentence would be reversed. Castillo fails to demonstrate that he would be entitled to relief.

After striking the invalid aggravating circumstances, two remain—Castillo was previously convicted of a felony involving the use or threat of use of violence and he committed the murder to avoid lawful arrest. This court may uphold a death sentence based in part on an

invalid aggravating circumstance by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Haberstroh*, 119 Nev. at 183, 69 P.3d at 682-82. Although Castillo argues that in reweighing or conducting a harmless-error review we must consider new mitigating evidence that was not presented to the trial jury, this court has reiterated time and again that reweighing is based on the trial record. *See Bejarano v. State*, 122 Nev. 1066, 1081, 146 P.3d 265, 276 (2006) ("Reweighing requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?"); *Rippo v. State*, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three *McConnell* aggravators and reweighing, looking only to the record for mitigating evidence); *Archanian v. State*, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (same); *State v. Haberstroh*, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003) (reweighing does not involve factual findings "other than those of the jury at the original penalty hearing"); *Bridges v. State*, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a "review of the trial record"). The special verdict indicates that one or more jurors found the following mitigating circumstances: (1) Castillo's youth at the time of the crime, (2) he committed the murder under the influence of extreme emotional distress or disturbance, and (3) "[a]ny other mitigating circumstances." Based on the record, the "other mitigating circumstances" found by the trial jurors may have included that Castillo admitted guilt, demonstrated remorse, cooperated with police, did not plan the murder, and had a difficult childhood. Considering these mitigating circumstances and the remaining valid aggravating circumstances, we are confident that the jury would

have concluded that the mitigating circumstances did not outweigh the valid aggravating circumstances. We further conclude beyond a reasonable doubt that the jury would have returned a death sentence after considering the evidence as a whole, which reflects a particularly brutal murder: Castillo hit the sleeping elderly victim several times in the head with a tire iron, smothered her face with a pillow, and later returned to burn the house down. Accordingly, we deny the rehearing petition.

It is so ORDERED.[1]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. David Barker, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]The Honorable Nancy Saitta voluntarily recused herself from participation in the decision of this matter.

CHERRY, J., dissenting:

I would not only grant rehearing, I would allow Castillo to have a new penalty hearing before a jury rather than have this court determine whether to impose the death penalty on a "cold record." My own experience in litigating death penalty cases tells me that there is a vast difference when a defendant is facing two aggravating circumstances rather than four aggravating circumstances.

I am seriously troubled by the majority's conclusion that beyond a reasonable doubt the jury would have returned a death sentence after considering the evidence as a whole. Certainly, almost every conviction for first degree murder with a death-eligible defendant is for a "brutal murder." However, what the majority overlooks is that the jury did in fact find mitigating circumstances and that a new penalty hearing would allow the new jury to weigh the remaining two aggravating circumstances with the mitigating circumstances to be provided by the defense. In light of the above, I would grant rehearing and encourage my colleagues to grant a new penalty hearing.

Cherry, J.
Cherry

RSPN
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 96C133336-1 DEPT NO: XIX

RESPONSE AND MOTION TO DISMISS THIRD HABEAS PETITION
DATE OF HEARING: 3/6/17
TIME OF HEARING: 8:30 AM

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

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In 1996, William Castillo was convicted and sentenced to death for beating an 86-year old woman in the head with a tire iron and then smothering her as she lay sleeping in her bed while Castillo and an accomplice burglarized her home, robbed her of a VCR, money, and silverware, and then set fire to the house in order to destroy evidence. Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). The convictions and death sentence were affirmed on direct appeal and Remittitur issued on April 28, 1999. Id.

Castillo timely filed his first state post-conviction petition on April 2, 1999, which was denied after an evidentiary hearing and affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC #40982). Remittitur issued on October 27, 2004. After five years of federal habeas litigation, Castillo returned to state court in a second state habeas petition filed on September 18, 2009. That petition was also denied and again affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 56176). Remittitur issued on December 17, 2013. Since then, Castillo continued his federal habeas litigation and currently has a petition pending in federal court.

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

ARGUMENT

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

I. The Third Petition is Procedurally Barred

A. Application of Procedural Bars is Mandatory

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a *duty* to consider whether post-conviction claims are procedurally

barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

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

B. NRS 34.726(1)

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). Remittitur issued from Petitioner's direct appeal on April 28, 1999. Therefore, Petitioner had until April 28, 2000, to file a timely habeas petition. Petitioner filed the Third Petition on January 6, 2017. As such, the Third Petition is time barred.

Even if the one-year rule did not begin to run until Petitioner's new issue was available, the Third Petition is still time barred. Petitioner's contention is that, "The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt." Third Petition, p. 23. Petitioner premises this contention upon Hurst. Id. at 13. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, this complaint is time barred because Petitioner failed to raise it within one year of Ring's publication.

C. NRS 34.800

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

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). More than five years has passed since Remittitur issued from Petitioner's direct appeal on April 28, 1999. Indeed, over 17 years have passed since Petitioner's direct appeal was final. As such, the State pleads statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against the Third Petition. After such a passage of time, the State is prejudiced in its ability to answer the Third Petition and retry the penalty-phase. If Petitioner's third go around on state post-conviction review is not dismissed or denied on the procedural bars, the State will be forced to track down witnesses who may have died or retired in order to prove a case that is more than two decades old. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in 1996.

D. NRS 34.810

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

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

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

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

Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became

available to him. Petitioner's contention is that a new penalty hearing is required because of Hurst. Third Petition, p. 25. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Petitioner's failure to raise this complaint by June 24, 2003, amounts to a waiver. Petitioner could have raised his Ring complaint during the litigation of his prior petitions or he could have filed an additional petition raising this contention. This complaint could have been presented to this Court at any point after June 24, 2002. Petitioner's failure to do so renders his claim procedurally barred under NRS 34.810.

II. Petitioner Fails to Justify Ignoring the Procedural Bars

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

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's

declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas finding by Supreme Court that defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (*citing* Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

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

A. No Good Cause

Petitioner's failure to prosecute his Ring / Hurst complaint within one year of when it became available precludes a finding of good cause. Petitioner's contention is that a new penalty hearing is required because of Hurst. Third Petition, p. 25. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, Petitioner had until June 24, 2003, to bring this claim. Petitioner has done nothing to address the more than fourteen years that have passed between June 24, 2002, and the filing of the Third Petition on January 6, 2017. Ring was continuously available to Petitioner during that nearly fifteen year period. Petitioner's silence is an admission that he cannot

demonstrate good cause. Polk v. State, 126 Nev. __, __, 233 P.3d 357, 360-61 (2010); District Court Rules 13(2); Eighth Judicial District Court Rules 3.20(b).

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

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

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

Nor can Petitioner fall back on allegations of ineffectiveness of prior post-conviction counsel for failing to raise a Ring challenge in a timely fashion since the Federal Public Defender (FPD) has represented Petitioner since July 7, 2004. Third Petition, p. 10. Further, the decision to litigate in federal court does not excuse Petitioner's failure to comply with Nevada's procedural default rules. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230

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

(1989), abrogated on other grounds, Huebler, 128 Nev. at 197, footnote 2, 275 P.3d at 95, footnote 2.

B. Insufficient Prejudice

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

1. Hurst Applies Prospectively Only

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

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

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

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

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS

649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."). It is important to note that this burden of proof issue is the entire point of Petitioner's argument. Third Petition, p. 24 ("Failure to instruct the jury on the burden of proof beyond a reasonable doubt violated Mr. Echavarria's right to a jury trial, due process of law, and a reliable sentence, and constitutes structural error which is prejudicial per se"). This conclusion, by the only Court offering any support to Petitioner's position, that his argument is fundamentally distinguishable from Hurst should be fatal to his complaint. Regardless, reliance upon the watershed rule of criminal procedure exception to the bar against retroactive application to final convictions is problematic because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006). Petitioner's conviction was final with the 1999 Remittitur from his direct appeal. As such, neither Ring nor Hurst apply to this matter.

2. Neither appellate reweighing nor the selection decision implicate Hurst

Either Petitioner is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on appeal of the denial of his second habeas petition violated Hurst. Order of Affirmance, SC# 56176, filed July 18, 2013; Order Denying Rehearing, SC# 56176, filed November 22, 2013. Both of these complaints are equally unpersuasive because the Nevada Supreme Court has rejected the view that the post-death eligibility selection decision is a factual determination.

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

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

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

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

a. The selection weighing instruction was appropriate

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

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

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

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

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

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

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

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

b. Appellate reweighing was appropriate

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

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

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

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

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

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

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

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

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

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

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

Id. at ¶ 7, 58 P.3d at 216.

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

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

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

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

As the Oklahoma Court of Criminal Appeals said in Torres:

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

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

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

III. Actual Innocence of Aggravating Circumstance

When a petitioner cannot demonstrate cause and prejudice, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the merits of any constitutional claims would result in a fundamental miscarriage of justice. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). When claiming a fundamental miscarriage of justice based on ineligibility for the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Id. Typically, a fundamental

miscarriage of justice in this context requires "a colorable showing" of actual innocence based on new evidence of factual rather than legal innocence. Id. However, the Nevada Supreme Court has allowed such gateway claims of actual innocence with respect to a capital petitioner's death eligibility when based upon a legally invalid aggravator. See e.g., Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). Petitioner makes such claims in regards to the aggravating circumstance in this case that the murder was committed to avoid or prevent lawful arrest.

Petitioner first claims that the evidence of the aggravating circumstance was insufficient and there were no facts other than felony murder to support it. Petitioner points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance. Also, the sufficiency of evidence at trial for this aggravator was upheld on direct appeal pursuant to the mandatory appeal provision of NRS 177.055(2)(c) and thus constitutes law of the case. Castillo v. State, 114 Nev. 271, 283, 956 P.2d 103, 111 (1998). Nonetheless, Petitioner was a roofer who was doing a construction project on the victim's house when he found a key and came back at night to commit a burglary. Once inside, he tried to be quiet but heard heavy breathing or snoring. Petitioner had been to prison twice before and in his own words to Det. Morgan which were played for the jury, he beat the victim's head in with a crow bar because, "I didn't want them to see my face. That way I couldn't get picked to be the person who was the burglar." Castillo's Voluntary Statement, 12/20/1995, attached hereto as Exhibit 1, at p. 11.

Next, Petitioner's arguments with respect to the legal validity of the aggravating circumstance do not present any issue of first impression. The Nevada Supreme Court has already rejected Petitioner's argument that the aggravator fails to provide constitutional narrowing and is inherent in every felony murder case. Blake v. State, 121 Nev. 779, 794, 121 P.3d 567, 577 (2005). The Court also has sustained the aggravator against allegations that it is impermissibly vague and overbroad. Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986). The aggravator does not require a preexisting relationship between the defendant and victim, Evans v. Nevada, 112 Nev. 1172, 1197, 926 P.2d 265, 281 (1996),

nor is it necessary that the arrest be imminent. Cavanaugh, *supra*. So long as the defendant clearly murdered the victim to avoid arrest, no more is required under the statute. Canape v. State, 109 Nev. 864, 875, 859 P.2d 1023, 1030 (1993). These definitions of the aggravating circumstance have not changed but have always been the law in Nevada based on the plain language of the statute, so there can be no ex post facto claim. Accordingly, Petitioner has not demonstrated actual innocence based on his challenge to the aggravating circumstance.

CONCLUSION

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

Dated this 31st day of January, 2017.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

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

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

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

SSO//ed

EXHIBIT 1

EXHIBIT 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT: 951217-0254

DATE: 12/20/95 TIME: 0035 HRS. PLACE: LVMPD DETECTIVE BUREAU

I, WILLIAM PATRICK CASTILLO [DOB: 12/28/72], am 23 years of age, and my address is .

WARNING: Before you are asked any questions, you must understand your rights.

I am DET. D. MORGAN of the Las Vegas Metropolitan Police Department and inform you that:

1. You have the right to remain silent.
2. If you give up that right to remain silent, anything you say can and may be used against you in a court of law.
3. You have the right to speak to an attorney before answering any questions, and to have an attorney present with you while you answer any questions.
4. If you cannot afford an attorney, an attorney will be appointed for you by the court at no cost to you, and you need not answer any questions until that attorney has been appointed for you.
5. If you decide to answer questions now, you may stop at any time and ask to talk to an attorney before any questioning continues.
6. If you decide to stop answering questions once you have begun, all questioning will stop.

WAIVER: I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and waive these rights. I do not want a lawyer present with me during the making of this statement. I know that I may revoke this waiver at any time during the questioning and ask that an attorney be present. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me.

WILLIAM PATRICK CASTILLO
[DOB: 12/28/72]

The following is the transcription of a tape-recorded interview conducted by DETECTIVE D. MORGAN, P# 3094, LVMPD HOMICIDE Detail.

Q. William, you realize this is being recorded?

A. Yeah

Q. I'm gonna give you some information on what we have and what happened here and I wanna see if you _____ con...confess with this, you know. We got the information. We just talked to Tammy, your girlfriend. Tammy told us on Sunday, you came home brought home the victim's property, told her you hit somebody. It got outta hand. And that person's dead.

A. My girlfriend said this?

Q. Yes, she did, on a taped statement, just like I'm taking from you now..

A. Could I hear that?

Q. You w... no, we don't have it right here in front of us now. Also your friend, Kirk...

A. Uhum

Q. ... he told us ..[both speaking at once] right. He told us that you told him ..

A. That I told him?

Q. That you told him, in person, that you found the key when you guys was scraping the roof.

A. Uhum

Q. Fell off the victim's house. You put it back and went back on Sunday and used that key to get in. You went inside the house. It was dark. You heard somebody in the back snoring. You had a tire iron in your hand. You whacked

the person in bed, in the face, a couple of times, heard some gurgling sounds. You then put a pillow over the person's face until you didn't hear them breathing any more. Took your bloody hands, flipped on the light switch; seen what you had done and left out with that property that's inside your house.

The property that you came home and told Tammy where it came from and what happened? Now all these people are making up this story?

A. [laughs softly] You know what, that's pretty sharp. That's pretty sharp. And no it didn't happen like that.

Q. Okay well, I'm just giving you an opportunity to tell me. I'm telling you what they told me. Now you tell me what happened. You were there. Ain't no doubt .

A. Naw, I wasn't there, man.

Q. You was there. Ain't no doubt about it, okay.

A. No doubt it.

Q. But this is in between you being cooperative and you just saying fuck it.

A. Fuck it.

Q. I'll ride this out.

A. I got to, man. I'm not copping to this shit. I didn't do this.

Q. Well, you ain't gotta cop to it. You done told everybody and it

[both speaking at once]

A. Now make sense of that. If I kill somebody, how am I gonna look going and tell somebody?

Q. Cause the shit bother you. [both speaking at once]

A. How did I kill...

Q. 'Cause it bother you. Because it bothers you. I mean, obviously you're not a crazed, heinous, fucking person and when this happened, it bothered you. Which it should have. You probably didn't mean for it to happen. Shit gets outta hand. You probably just went in there to burglarize the place. For whatever reason, it got outta hand and this is what happened. And the shit bothers you and that's why you told somebody. But the now is the time to step up to the plate and get it off your chest and deal with it. It ain't going away. It happened. These people know it happened. The shit's in you house. It happened. You know, let's deal with it. It's not going away. We know it happened. Now either you can say, hey you know, we can go on and just play hardball or you can show some remorse and deal with this thing. Here's your opportunity.

A. My old lady said that I came home....

Q. What?

A. ... I had told her that I beat the lady. Kirk says that I told him I killed her. ... . [silent pause]... ...

Q. You know don't put this on them. This is something you did, why you gonna put it on them.

A. I'm not trying to put nothing on them.

Q. I say, you trying to put it on _____, but I mean, you burden these people with this information, you know. Just like it bothers you now. You know how many.... They didn't want to hear that. I mean, they probably turn. She obviously loves you, you know, but what does she do. You put her in that situation. What does Kirk do? You put him in that situation. You know, he's like... what did he even have to tell me this. I didn't wanna know this. You know this is how you burden them with it, you know. I mean, what kinda position you put them in. They didn't wanna.... you know, they didn't have to deal with this. You know, she loves you. You put her in this position. You'd been better off not telling her, but obviously it bothered you. You wanted to get it off your chest. Now here's the time to get it off your chest. Deal with it, you know. This thing happened. It ain't going away. We're here dealing with it now. They want to wash their hands of it 'cause they're telling the truth, you know. It's your turn to tell the truth. You burdened them. You brought them into this deal. They wasn't there, you know, you brought them into this deal. You blame them for stepping up and telling the truth.

A. I don't blame nobody for nothing.

Q. Exactly.

A. Can I have a cigarette?

Q. I don't know.. I don't smoke. And it's a non-smoking building.

A. I could really use one, in the worse kinda way _____

Q. I understand that. But understand, it's.. it's not available. I mean, I'm the only one in the building. Me and the guy that brought you up and we don't smoke. If I had one, then we could probably work something out.

(silent pause)

Q. Like I said, I could believe that, you know, you didn't want that happen. It was a old lady. I mean, obviously, you could've you know, tied her up, knocked her out, a whole lot of things. I mean, obviously it just got outta hand, you know. Now's the time to deal with it, you know. I'm sure you didn't mean for it to happen like that. It's no reason for it to happen. Old lady 86 years old. Even is she'da woke up and got up, I mean....what could she have done. I mean, you gotta understand that. Something obviously got outta hand and obviously it bothered you or you wouldn't have told these people, you know. If it didn't bother you, you coulda went through life none of them never knowing nothing, but you wanted to get it off your chest. And now you've burdened them with it. I mean... what do you think it was like for them to live with having that information.

A. And what does Michelle say?

Q. We haven't located her yet. She wasn't home.

A. (both speaking at once)

Q. We know she was there.

A. She was where?

Q. With you.

A. With me?

Q. She drove you over there. Yeah. In the white Mazda. We know everything that happened. We know you ...

A. Sounds like .....(both speak at once)

Q. We do! Because you burdened these people with the information. I mean, what do you think it was like for them having this information. You what it is like being on your chest. So what do you think it's like for these people, who wasn't there, but now they know. They got this information in their mind. I mean, shit, they couldn't eat, you know. You know what shit was like for Tammy. You.. you're there with her. Kirk.... He said he hasn't been able to eat since he heard this, you know.

A. When did you talk to Kirk, just a minute ago, not too long ago?

Q. Yep

A. I really need a cigarette.

Q. I wish I could give you one if it would help you relieve, you know, I'd give you one. You know it wouldn't been the first time we did it, but I honestly ....

A. I need a cigarette.

Q. ..... I honestly don't have one. I don't smoke. It's a no smoking building. Only people in here is me and the other guy and he don't smoke either.

[silent pause]

Q. You're only helping yourself straightening this thing out, man. It's a done deal. It's a done deal.

A. Oh, I know it is.

Q. Everybody know what happened. We all know and the pieces fitting all together. Just a matter of relieving.. you know.

A. ..... you actually hearing me saying that I did it. That's what you.. that's what you wanna hear, right?

Q. That's it, man. You know and put a closure to this whole deal. The victim's family can, you know, close this whole thing. Tammy can close this thing and start dealing with what, you know, has to be dealt with. Kirk can deal with what has to be dealt with. You can deal with what has to be dealt with. It's a long process. You've been around.

A. Yes.

Q. You know, but I mean you gotta think, you know, that.. that 86 year old lady never bothered nobody. Just at home you know. Everybody, I mean, you know... ... she.. she didn't deserve that man. Never done nothing in her life but she was a teacher. She went to work every day, you know. Getting to the end of her rope and this is the way she went out, man. You can get a closure with this whole thing, you know. You know, give her _____ I mean, this is the last thing you can do to give some closure to her life. AT least her family won't have to suffer through never knowing why, what happened and why did it have to happen.

A. That would be the right thing to do.

Q. It is, man, I mean, you know. We all know what happened, but I mean, you can give her family some closure. You can't change what happened. It happened. It's a done deal. She's gone. You're here. The other people are here. Everybody know is here, but all we can do... you know. Her family is gonna be torn apart. I mean, and they'll never know why. That's the part that hurts the most. People just wanna know why; what really happened. You know and three people know. The victim, you and Michelle.

[silent pause]

Q. Tell us what happened, man. Start with the, you know, when you came in the house.

A. Sure you can't give me a cigarette, man.

Q. I swear if I had one, I would give it to you. I mean, I don't smoke. You see, there's no ashtray.

A. _____ cigarette.

Q. I understand that, you know, but it's not none available and I can't stop the tape. Once the tape's going, gotta keep the tape going.

A. [silent pause] Working on this lady's roof, man, I was doing the back yard clean up, stumbled across a key in a little.. little black box. Take the key, opened it up. Looked at it. I guess these people were on vacation. I didn't know who it was. I didn't know the residents that lived at. Didn't know nothing about it. Just knew that Harry got me a side job. So we was doing the side job. Let's see [sighs]. As I said, I had... today I hadda have $325.00 for my lawyer to represent me over some bullshit battery, it's Christmas, rent's around the corner, so I'm figuring, you know what, I use to be pretty sharp at the burglary game. Lemme go check it out. It's all over money, man. Anyway... And it went down just like you said, man. You got it.. you got it all. That's what happened. That's what happened. I knew the house, using the key. It was real dark inside. Couldn't see nothing. Walked to the back where I heard the breathing come from. I heard heavy breathing, snoring. I thought it to be a man. I didn't, like I said, I never knew who lived in there. Okay. It was dark.

I had two choices. I can hit this person and to try to put him to sleep or ... 'cause see the whole trip... my whole trip was, is due to the fact I've already been to prison twice. I didn't want them to see my face. That way I couldn't get picked to be the person who was the burglar. Man, that's fucking mental. Stepped around the corner, hit the object that I seen. I didn't see a body. I didn't see a person. I heard the snoring. You know, my eyes had adjusted somewhat to the dark and all I could see is the outline. Like I said, I didn... I.... I hit, I guess it was her, I hit her a couple of times and I'm thinking, you know, the noises... I'm thinking it's a dude, okay, the noises this guy is making is I'm thinking he's getting up outta bed and so on and so forth. So I hit him a few more times and then a few more times. By then it was too late. I didn't know, at that time, I still didn't know who it was... who was in that bed. So no noise could be heard, I put the pillow over the face did a quick bullshit ass scan to his face. You know, you know what fucks me up over this whole thing, is it coulda all been have been prevented. It was all avoidable. My old lady put the fucking stupid idea in my head 'cause we couldn't get no more money. See all her.. her friends usually send her money to do this and to do that. And you know what, I... when this weekend came around, I didn't have the money to pay my lawyer. I didn't have the money to do dick. I didn't have the money to buy my little brother a skateboard for Christmas and my sister a

tape. Couldn't do nothing. Didn't have dick. So I'm thinking, I gotta cover my lawyer. So that's ... bad seed was planted there you know, and ... and I just, well I was so.. I was so worried about that person seeing my face, I kept it dark. I kept to the shadows. You know how bad I felt when I found out who it was, man. Have any idea? Fucking it... It ripped me apart inside. It ripped me apart. You know, I didn't... I hadn't the slightest clue it was a woman, an old woman at that, you know. If I'da known there'd been a lady in there, man, I just woulda tied the sheet around the bed, you know, woulda tied the sheet around the bed. The way she was snoring it sounded like, you know, a good size is male. So then I did... I did it. I did it. I feel like shit because I did it. I can't change the past. I just gotta deal with what comes next.

Q. Who was with you?

A. I'll let that person. I ain't gonna tell on nobody. I'll tell all my stuff though.

Q. What'd you hit her with?

A. Bumper jack.

Q. What'd you do with it?

A. Dispose of it.

Q. Where at?

A. AT a dumpster.

Q. Where?

A. It's long gone by now.

Q. We'd still like to know.

A. Believe it or not, it's right down Lake Mead and Jones by the 7 Eleven. I drove back behind the 7 Eleven, it was all _____ plexed out and shit, threw it in the dumpster

Q. Where'd it come from?

A. Michelle's car. Out the back of the car.

Q. Why'd you keep the stuff you took?

A. Hoping to sell it, just so I could try to make my ends meet.

Q. How'd the part about the ..starting the place on fire, why did you do that?

A. Fingerprints.

Q. Where'd you get the fluid at?

A. Had a bottle.

Q. So you planned on ....

A. No, as a matter of fact, these mess... you know, it didn't happen like that. I'm trying to avoid [sighs]. Like I said, I'll cop to what I did, but I, you know, I uh...

Q. Did you guys leave and come back and burn it? Is that what happened?

A. I won't say you guys to anything. I'll say did.

Q. Well just tell me what happened? I mean, how'd it come about?

A. What do you mean, how'd it come about?

Q. The burning part.

A. I don't know actually. You know what, the honest truth is?

Q. That's what I'm looking for.

A. I do believe the reason I burnt it was because I was so disgusted with what I had done, I was kinda hoping that the fire would destroy everything and not leave no evidence of that gruesome fact. 'Cause I couldn't accept the fact that I did that let alone want anybody else to find.

Q. But did you burn it while you was there or did you leave and come back?

A. Left and came back.

Q. About how long?

A. Ten minutes. Twenty minutes.

Q. How'd you get back in?

A. Same way I got in the first time.

Q. With the key? Never kicked the door open or nothing like that?

A. No.

Q. Did you take the stuff the first time or .....?

A. [no audible response]

Q. Did you already have the lighter fluid or did you have to go buy it or...?

A. Already had it. I had gloves on, there ain't no fingerprints in that house.

Q. You had gloves on both times?

A. [no audible response]

Q. So you basically burned it because of what happened, not fingerprints.

A. Yeah. Yeah.

Q. Yeah, which one

A. I burnt it because I was fuck in. I wanted to get rid of that place. I wanted to hide the ugly facts, that's why I burnt it.

Q. Is that why you told people, to get it off your chest?

A. Yeah, can't deal with it. It wasn't supposed to happen like that, man. It wasn't supposed to happen at all. Fucking shit..... Like you said, it got way outta hand. I don't understand how you can let something get outta hand to that extent. See, I thought I was dealing with a full grown man and that's it, you know. Full, deep voice, fucking snores and shit, I'm like....there's a big dude in the bed. Not supposed to be a little 86 year old lady, man. I'm going to hell for this one and I know it. _____ You're right. She didn't. The lady didn't deserve that. That was fucking... that was bullshit is what that was.

Q. So you're not gonna say who was the other participant with you.

A. No, I can't do that.

Q. How you....uh... how you think they feel. Have you guys talked about this?

A. Who?

Q. The other person.

A. I did it by myself. You know I can't sit here and tell on nobody else.

Q. Yeah, I understand that, but I'm just saying if you guys talked about it. Do you think that person has any remorse and, you know, ready to get it off their chest also?

A. Due to the fact that I know this is being recorded and will be used for evidence later, I say, I did it myself.

Q. Okay, I understand that, but I'm just asking you a question. That person feel like... I mean, we know you did __ so I'm just saying...

A. I know you're just asking me a question...

Q. Yeah

A. ... but it's gonna be on tape, regardless of whether you ask me or not, right. I'm not gonna tell on nobody. I'll tell you what I did.

Q. Is there anything else that I don't know about, that happened that may, you know, like some property that was taken and we don't know about that we may be able to recover? Was there any other things that was taken?

A. ____ Little old stocking, little things.

Q. Was there anything else in the house that belonged to the victim? Any little charms or anything that may have some sentimental value to the family?

A. Oh...yeah, think so.

Q.. What's that?

A. It's little bags got a couple of watches in it.

Q. Where's the bag at?

A. At the _____

Q. If you had to guess, where would think it would be at? What's a good place to look?

A. [no response]

Q. What color is the bag?

A. It's a ziplock bag, a clear ziplock bag. What.... I don't even know where that... I don't even know where it's at. I honestly don't believe that right now, at this present time, it's at my house.

Q. Is there anything else might be helpful _____? I mean, you truly have done the right thing.

A. Yeah, I know. I know that.

Q. If there's anything that you, you know, it's not much you can do, but this was something that was the right thing.

A. Now I'm gonna go to hell for this one, but you know what, if I could take it back, I would, because I really didn't mean that lady no harm. Not like that. I.. I didn't wanna hurt her. I didn't wanna hurt her. I didn't wanna hurt nobody that night. I was just out to try to make a couple of bucks, man, so I

can the fuck.... You know why? What really blew my head back is I.. is my old lady was supposed get her check from one of her ... her boyfriends -- not her boyfriends but her friends send her you know, little care packages of two and three hundred dollars ____ so on and so forth. She was using that money to pay for the lawyer, so on and so forth, and I was ... all I wanted to do was get my little brother a skateboard and my little sister a LL Cool J tape. I ain't got no money. I ain't got nothing and I work all week long, but that don't justify shit. I'm not trying to justify nothing. I'm just saying that...I just.. guess I'm saying it 'cause I need some serious psychiatric fucking help, huh. Sorry, [short laugh] that's.. t hat's.. the w.. the....fucking _____, man. You know what, I told Kirk, because... ... he's been my friend since, you know, I met him. You know what, I don't hold nothing against him for him telling you guys, either. I love that dude. It's just fucking... I just couldn't... have that on my shoulders. I don't know why; I just couldn't deal with it. I've dealt with so much other shit in my life that was wrong and I knew it. I couldn't deal with... so I told Kirk. I told Tammy when I came home. She pretty much... she wants... she_____. Did she really give you the tape said it all?

Q. Not me personally, but .....

A. She did. That's surprises me. Now that's about it. It's about all I got to say, man. This shits fucked up.

EVENT: 951217-0254

WILLIAM PATRICK CASTILLO (DOB: 12/28/72)

Q. This concludes the interview. Same persons present. Time is 0100 hrs. on 12/20/95.

I HAVE READ THIS STATEMENT CONSISTING OF 19 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT 0100 HOURS ON THE 20TH DAY OF DECEMBER, 1995.

WITNESS: _____

WITNESS: _____

_____
SIGNATURE OF PERSON GIVING STATEMENT

DM/aa/95D6272
961217-0254
12/20/95 1445 hrs.

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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO,

Petitioner,

v.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Nevada Attorney General,

Respondents.

Case No. 96C133336-1
Dept. No. XIX

Hearing Date: April 17, 2017
Hearing Time: 8:30 a.m.

OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS

(Death Penalty Habeas Corpus Case)

Petitioner William P. Castillo submits the following Opposition to the State's Response and Motion to Dismiss Third Habeas Petition.

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This Opposition is made and based on the following points and authorities and the entire file herein.

DATED this 8th day of March, 2017.

Respectfully submitted,
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Castillo filed his petition for writ of habeas corpus ("Petition") in this Court on January 6, 2017. In the Petition, Castillo raised three grounds for relief: (1) his death sentence is invalid because the jury in his capital case was not instructed that in order to find Castillo eligible for the death penalty, it must first find that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt (Claim Three); (2) his death sentence is invalid because the Nevada Supreme Court reweighed his eligibility for the death penalty by substituting the decision of the appellate court for the decision of the jury and by failing to find the condition of eligibility beyond a reasonable doubt (Claim One); and (3) his death sentence is invalid due to the Nevada Supreme Court's arbitrary and capricious application of the avoid or prevent lawful arrest aggravating circumstance and due to the insufficiency of the evidence to support the aggravating circumstance (Claim Two). See Pet.

The State filed its Response and Motion to Dismiss Third Habeas Petition ("Response") on January 31, 2017. With respect to Claims One and Three ("Hurst claims"), the State argues that the Petition should be dismissed on three grounds. First, the State argues Castillo's Hurst Claims are procedurally defaulted and invokes three procedural bars. Second, the State contends Castillo's Hurst claims fail on the merits. And third, the State contends that even if Castillo's interpretation of Hurst is correct, Hurst does not apply retroactively to Castillo's death sentence. Resp. at 2-16. With respect to Claim Two, the State argues that there was sufficient

evidence to support the aggravating circumstance and further, the Nevada Supreme Court has previously rejected this claim.

As detailed below, the State's arguments fail and Castillo should be granted a new sentencing hearing.

II. CASTILLO'S HURST CLAIMS ARE NOT PROCEDURALLY BARRED

The State argues Castillo's Hurst claims, Claims One and Three, are procedurally barred on three grounds, all of which center on Castillo's failure to file the claims sooner. Resp. at 2-6. The State invokes the following three procedural bars: (1) the timeliness provisions of NRS 34.726, Resp. at 3-4; (2) the successive petition and abuse-of-the-writ bars of NRS 34.810, Resp. at 5-6; and (3) the laches provisions of NRS 34.800, Resp. at 4-5. For the reasons below, the State's arguments fail.

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

Castillo can overcome all three of the procedural defaults invoked by the State by establishing good cause for his previous failure to file Claims One and Three. "A showing of good cause for the delay in raising a claim has two components: (1) that the delay was not the petitioner's fault and (2) that dismissal of the petition as untimely will unduly prejudice the petitioner." Rippo v. State, 132 Nev. ___, 368 P.3d 729, 738 (2016) (internal citation and quotation marks omitted), reh'g denied (May 19, 2016), cert. granted, judgment vacated on other grounds sub nom. Rippo v. Baker, No. 16-6316, 2017 WL 855913 (U.S. Mar. 6, 2017). The Nevada Supreme Court has held that a showing of good cause and prejudice overcomes the procedural bars set forth in both NRS 34.726 and NRS 34.810, see id. at 736-38; see also Pellegrini v.

State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001), and that a showing of good cause and prejudice can also overcome NRS 34.800's laches provisions. See State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (holding State's invocation of NRS 34.800 would be meritless because petitioner established good cause and prejudice).

First, to demonstrate "good cause," Castillo must demonstrate that an "impediment external to the defense" prevented him from raising his claims earlier. See Rippo, 368 P.3d at 738; Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "'A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default.'" Rippo, 368 P.3d at 738 (quoting Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)) (emphasis added). In particular, the Nevada Supreme Court has held that good cause to overcome a state procedural default exists when "a federal court concludes that a determination of this court is erroneous." Evans v. State, 117 Nev. 609, 644, 29 P.3d 498, 521 (2001), overruled in part on other grounds by Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015). To satisfy the good cause requirement, Castillo must show he raised his Hurst claims within a "reasonable time"—namely, one year—"after the basis for the claim bec[ame] available." Rippo, 368 P.3d at 739-40. Second, "[a] showing of undue prejudice necessarily implicates the merits of the" procedurally defaulted claim. Id. at 740.

Castillo can demonstrate good cause and prejudice because the Petition's Hurst claims, Claims One and Three, are based on a new rule of constitutional law

announced by the United States Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016). As set forth in further detail below, Hurst held for the first time that a determination that the mitigating circumstances do not outweigh the aggravating circumstances ("weighing determination"), when required by a state for imposition of the death penalty, is a "fact" that increases a defendant's statutory maximum punishment. As a result, the weighing determination constitutes an "element" of the offense of conviction that is subject to various procedural protections under the Due Process Clause and the Sixth Amendment: namely, it must be determined by a jury and proven by the State beyond a reasonable doubt. Hurst effectively overruled the Nevada Supreme Court's decisions in McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009), as corrected (July 24, 2009), and Nunnery v. State, 127 Nev. 749, 770-76, 263 P.3d 235, 250-53 (2011). In McConnell and Nunnery, the Nevada Supreme Court had held that the weighing determination was not a "factual" determination subject to the procedural protections of the Due Process Clause and the Sixth Amendment. See Nunnery, 127 Nev. at 776, 263 P.3d at 253; McConnell, 125 Nev. at 254, 212 P.3d at 314-15.

Castillo was not afforded the procedural protections he was due under Hurst. As set forth in Section III.A., the Nevada Supreme Court has held for three decades that a jury must conclude the mitigating circumstances do not outweigh the aggravating circumstances of a crime to find a criminal defendant eligible for the death penalty in Nevada. Hence, the jury at Castillo's 1996 penalty trial was instructed that this weighing determination was necessary to consider the death

penalty. See Penalty Instruction No. 7. Critically, however, the jury was not instructed that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. The trial court's failure to instruct the jury as to the State's burden of proof constituted structural error under Hurst that necessitates vacating his death sentence.

Castillo can overcome all of the procedural defaults raised by the State because he can establish good cause and prejudice. Prior to Hurst, there was no controlling authority establishing the merit of Castillo's Hurst claims. Rippo, 368 P.3d at 738. In fact, had Castillo raised his Hurst claims in this Court prior to Hurst, the claims would have been denied as meritless because of the Nevada Supreme Court's decisions in McConnell and Nunnery. The decision in Hurst serves as good cause for Castillo's failure to raise his Hurst claims sooner because it established the merit of Castillo's Hurst claims and effectively overruled McConnell and Nunnery. See Rippo, 368 P.3d at 738; see also Evans, 117 Nev. at 644, 29 P.3d at 521 (recognizing that a federal court's reversal of a Nevada Supreme Court decision constitutes good cause to excuse a procedural default). Moreover, Castillo raised his Hurst claims within one year of Hurst: Hurst was decided on January 12, 2016 and Castillo filed his Petition on January 6, 2017. Rippo, 368 P.3d at 739-40. Finally, with respect to prejudice, as set forth in greater detail in Section III.C., Castillo's Hurst claims are meritorious because the trial court's failure to instruct the jury regarding the beyond-a-reasonable-doubt standard constituted structural error. Consequently, Castillo has established good cause and prejudice.

The State repeatedly argues Castillo could have raised Claims One and Three before Hurst was decided. Resp. at 2-9. According to the State, "Hurst was merely an application of Ring [v. Arizona, 536 U.S. 584, 586 (2002)]." Resp. at 3-4, 6-8. In other words, the State contends that the legal basis for Castillo's Hurst claims was available at the time Ring was decided. In support, the State quotes language within the Hurst decision citing and relying on Ring's reasoning. The State concludes that because Ring was decided on June 24, 2002, Castillo should have raised his Hurst claims within one year from this date—namely, June 24, 2003. Resp. at 3-4, 6.

The State misstates the holding in Ring. In Ring, the United States Supreme Court concluded that Arizona's capital sentencing scheme was unconstitutional. 536 U.S. at 586. Under this scheme, a person could be found eligible for the death penalty if "at least one aggravating factor [wa]s found to exist [by a judge] beyond a reasonable doubt." Id. at 597 (internal quotation marks omitted). Without this determination, Arizona statutes provided that the maximum penalty that a defendant could receive was life imprisonment. Id. The question presented in Ring was whether the existence of an aggravating factor was an "element" of the offense of conviction that had to be found by a jury, not a judge, under the Sixth Amendment. Id. The United States Supreme Court in Ring concluded the existence of an aggravating factor in Arizona was the "'functional equivalent of an element of a greater offense'" because it constituted "a fact increasing punishment beyond the maximum authorized by a guilty verdict standing alone." Id. at 605, 609 (internal citation and quotation marks omitted). Hence, the United States Supreme Court held

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

Ring, unlike Hurst, did not establish the merit of Castillo's Hurst claims. Ring merely held that the existence of an aggravating circumstance, when required for death-eligibility, is a "fact" that increases a defendant's statutory maximum punishment and is subject to the Sixth Amendment's procedural protections. In other words, Ring focused entirely on Arizona's requirement that a judge determine the existence of an aggravating circumstance. Unlike Hurst, Ring did not address whether the weighing of aggravating and mitigating circumstances is also subject to such procedural protections because Arizona's death penalty scheme did not require that a factfinder weigh aggravating and mitigating circumstances in order to find a defendant death-eligible. In fact, the United States Supreme Court in Ring explicitly took note of this, stating the defendant "ma[de] no Sixth Amendment claim with respect to mitigating circumstances." Id. at 597 n.4.

Further, Castillo is essentially in the same position as Delaware litigants who pursued claims in the wake of Hurst. In both Delaware and Florida, courts had rejected, prior to Hurst, the proposition that a jury must conduct its weighing analysis under a reasonable doubt standard. See, e.g., Brice v. State, 815 A.2d 314, 322 (Del. 2003) ("Ring does not extend to the weighing phase."); Ault v. State, 53 So. 3d 175, 206 (Fla. 2010) (concluding that "a jury did not have to be instructed that it was required to balance aggravating and mitigating circumstances using a 'reasonable doubt' standard"). After Hurst, however, the Delaware Supreme Court

understood the impact of Hurst and overruled its prior decisions to the contrary. See Rauf v. State, 145 A.3d 430, 434 (2016) (concluding, under Hurst, that the jury weighing determination must be made by a jury unanimously and beyond a reasonable doubt, and overruling its prior decisions to the extent they are inconsistent with this holding).[1] In short, it is Hurst, not Ring, which unequivocally establishes Castillo's entitlement to relief.

Accordingly, because there was no controlling authority establishing the merit of Claims One and Three until the United States Supreme Court's decision in Hurst and because Castillo raised these Hurst claims within a "reasonable time" of the Hurst decision, he has shown good cause to overcome all of the procedural defaults raised by the State and resulting prejudice. See Rippo, 368 P.3d at 738-40.

B. NRS 34.800 Does Not Bar Castillo's Hurst Claims For Other Reasons

1. NRS 34.800 does not apply to Castillo's Hurst Claims because the delay in filing is not attributable to Castillo

NRS 34.800 does not bar Castillo's Hurst Claims, Claims One and Three, for additional reasons. As an initial matter, NRS 34.800 does not apply to here. The Nevada Supreme Court held in State v. Powell, 122 Nev. 751, 758-59, 138 P.3d 453,

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

458 (2006), that NRS 34.800 does not bar a habeas petitioner's claim if delay in raising the claim cannot be attributable to the petitioner. Here, as in Powell, the delay in filing Claims One and Three cannot be attributed to Castillo because there was no controlling authority establishing the merit of Castillo's Hurst claims until the United States Supreme Court's January 2016 Hurst decision.

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

As in Powell, the delay in filing Claims One and Three is not attributable to Castillo. Prior to Hurst, no controlling authority established the merit of Claims One and Three. Once Hurst was decided, Castillo timely filed Claims One and Three. Accordingly, under Powell, NRS 34.800 cannot apply to bar Castillo's Hurst claims.

2. Even if NRS 34.800 applies to the Hurst claims, Castillo can overcome any presumption of prejudice to the State

Even assuming NRS 34.800 applies here, Castillo can overcome any presumption of prejudice to the State. NRS 34.800 establishes separate standards by which a petitioner can overcome NRS 34.800(2)'s rebuttable presumption that the State has been prejudiced in its ability to both retry a petitioner and to respond to her or his petition. To rebut the presumption that the State would be prejudiced in responding to a petition, a petitioner must demonstrate that her or his petition is "based on grounds of which [she or] he could not have had [prior] knowledge by the exercise of reasonable diligence." NRS 34.800(1)(a). To rebut the presumption that the State would be prejudiced in retrying the petitioner, the petitioner must demonstrate a "fundamental miscarriage of justice." NRS 34.800(1)(b). "A fundamental miscarriage of justice requires 'a colorable showing' that the petitioner is 'actually innocent of the crime or is ineligible for the death penalty.'" Emil v. State, 126 Nev. 708, 367 P.3d 766, 2010 WL 3271510, at *2 (2010) (quoting Pellegrini, 117 Nev. at 887, 34 P.3d at 537).

Castillo can rebut both of the presumptions created by NRS 34.800(2). First, Castillo can rebut the presumption that the State has been prejudiced in its ability to respond to the Hurst claims because he could not have had prior knowledge of the grounds by the exercise of reasonable diligence. See NRS 34.800(1)(a). As set forth above, Claims One and Three are based on a new rule of law set forth in Hurst. Castillo did not have controlling authority to support these claims prior to the decision in Hurst. Moreover, Castillo filed his Hurst claims within a "reasonable time"

(i.e., within one year) after Hurst was decided. See Rippo, 368 P.3d at 739-40. Hence, Castillo can overcome the presumption that the State has been prejudiced in responding to Claims One and Three. See NRS 34.800(1)(a).

Second, Castillo can rebut the presumption that the State has been prejudiced in its ability to retry him for an additional reason: he can make a "colorable showing" that he is ineligible for the death penalty in light of Hurst. Emil, 2010 WL 3271510, at *2 (quoting Pellegrini, 117 Nev. at 887, 34 P.3d at 537). Under Hurst, Castillo's jury should have been instructed that it could not have sentenced him to death unless it found beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances of his crime. Had Castillo's jury been correctly instructed pursuant to Hurst, Castillo would not have been found eligible for the death penalty. At Castillo's penalty trial, the jury found Castillo eligible for the death penalty because it found four aggravating circumstances and concluded that they were not outweighed by the three mitigating factors. Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107 (1998). On November 22, 2013, the Nevada Supreme Court struck two of the aggravating circumstances and found the other two aggravating circumstances sufficient to support a finding that Castillo death-eligible. Ex. 2 to Pet. Given that half of the aggravators found by the jury were stricken by the Nevada Supreme Court as invalid, it is unlikely the jury would have found Castillo death-eligible if it had been properly instructed as to the State's burden of proof pursuant to Hurst. Hence, Castillo can make a "colorable showing" that he is ineligible for the death penalty and thereby overcome the presumption that the State

has been prejudiced in responding to the Petition. See NRS 34.800(1)(a); Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Accordingly, for the reasons set forth above, Claims One and Three are not procedurally defaulted on any of the grounds raised by the State.

III. CASTILLO'S HURST CLAIMS HAVE MERIT

Under Nevada law, a criminal defendant cannot be sentenced to death unless a jury finds that the mitigating circumstances do not outweigh the aggravating circumstances of the crime. During Castillo's 1996 penalty trial, the trial court instructed the jury it had to make this weighing determination in order to find Castillo eligible for death. However, the trial court failed to instruct the jury that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. As set forth below, the trial court's failure to provide such an instruction was erroneous under the United States Supreme Court's decision in Hurst. Hurst held that the weighing determination constitutes an "element" of the crime that the State must prove beyond a reasonable doubt under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, Castillo's death sentence must be vacated.

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

The United States Supreme Court has instructed that the capital sentencing process must proceed in two phases. First, during the "eligibility phase," a factfinder must determine whether an individual is eligible for the death penalty, based on requirements designed to "limit the class of murderers to which the death penalty

may be applied." Brown v. Sanders, 546 U.S. 212, 216 (2006). Second, after a defendant has been found eligible for the death penalty based on these requirements, the factfinder must "determine[] whether to impose a death sentence on an eligible defendant," at the stage of the proceedings known as the "selection phase." Buchanan v. Angelone, 522 U.S. 269, 275 (1998). During the selection phase, the sentencer must be allowed to "weigh the [aggravating] facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence" and "select" whether "a defendant eligible for the death penalty should in fact receive that sentence." Tuilaepa v. California, 512 U.S. 967, 972 (1994).

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

The Nevada Supreme Court has explicitly described Nevada as a "weighing state," where a jury must weigh aggravating and mitigating circumstances during the eligibility phase. See Canape v. State, 109 Nev. 864, 879, 859 P.2d 1023, 1032

(1993). Nevada's death penalty statute provides that "[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3) (emphasis added); see also NRS 200.030(4)(a) (holding that the death penalty can be imposed for first-degree murder "only if . . . any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

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

Nev. 167, 176, 679 P.2d 797, 802 (1984) ("The sentencing authority must . . . determine whether the mitigating factors outweigh the aggravating factors; if they do not, the death penalty may be imposed."). Once a defendant's death-eligibility is established, the proceedings shift to the selection phase and the jury "must then decide on a sentence unanimously and still has discretion to impose a sentence less than death." Hollaway, 116 Nev. at 746, 6 P.3d at 996.

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

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

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

weigh aggravating and mitigating circumstances to find a defendant death-eligible in Nevada.

Despite the weight of authority to the contrary, the State contends Nevada juries need not weigh aggravating and mitigating circumstances during the eligibility phase. Resp. at 11-12. The States cites Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015) for the proposition that a defendant's death-eligibility is "establish[ed]" "[o]nce the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt. . . ." Id. at 11. According to the State, the "second step" identified by the Nevada Supreme Court in Johnson—namely, the weighing of aggravating and mitigating circumstances—is actually "part . . . of the selection phase of the capital sentencing process." Id. at 11-12.

The State's reliance on Lisle is misplaced. In Lisle, the Nevada Supreme Court considered whether a "claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim [can] be based on a showing of new evidence of mitigating circumstances." 351 P.3d at 730-34. The Nevada Supreme Court ultimately narrowed the circumstances in which actual innocence arguments can be used as a gateway to reach a procedurally defaulted claim. Id. Specifically, the Nevada Supreme Court held that while a capital habeas petitioner could show actual innocence of a death sentence by challenging a jury's finding regarding the existence of an aggravating circumstance, she or he could not offer new mitigation evidence to challenge a jury's determination regarding the weight of aggravating and mitigating circumstances. Id. The Nevada Supreme Court reasoned that to hold otherwise would

not be "workable" because it "would allow the [actual innocence] exception to swallow the procedural bars" by permitting petitioners to constantly present new mitigation evidence through actual innocence arguments. Id. at 734. Lisle did not hold, as the State apparently maintains, that a jury's weighing of aggravating and mitigating circumstances is not part of the eligibility phase of the capital sentencing process. In fact, Lisle explicitly acknowledged that there is a "unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances." Id. at 732.

The Nevada Supreme Court's analysis in Burnside v. State—a decision issued on the very same day as Lisle—confirms that Lisle did not change Nevada's requirements for death-eligibility. See 131 Nev. __, 352 P.3d 627 (2015), reh'g denied (Oct. 22, 2015), cert. denied, 136 S. Ct. 1466, 194 L. Ed. 2d 563 (2016). In Burnside, the Nevada Supreme Court reviewed on direct appeal whether a capital defendant's death sentence survived the striking of an invalid aggravating circumstance on appeal. Id. at 646. In particular, the Nevada Supreme Court assessed whether the defendant could still be considered eligible for the death penalty in light of the stricken aggravator. Id. The Nevada Supreme Court concluded the defendant was still death-eligible, explicitly reasoning "the invalid aggravating circumstance would not have affected the jury's weighing of the aggravating and mitigating circumstances." Id. The Nevada Supreme Court's reference to the weighing process when discussing the defendant's death-eligibility confirms that the weighing of

aggravating and mitigating circumstances remains part of the eligibility phase of the capital sentencing process in Nevada. See id.

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

As set forth below, the United States Supreme Court has interpreted In re Winship, 397 U.S. 358 (1970), to hold that a factual determination rendering a criminal defendant eligible for a sentence above the statutory maximum authorized by a guilty verdict alone effectively constitutes an "element" of the offense of conviction subject to various procedural protections under the Due Process Clause and the Sixth Amendment—namely, that it must be proven to a jury beyond a reasonable doubt.

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

Over the past several decades, the United States Supreme Court has expanded the definition of an "element" subject to Winship's standard of proof and the associated right to a jury trial. The United States Supreme Court in Winship

originally defined the elements of a criminal offense as "every fact necessary to constitute the crime" under state law. 397 U.S. at 364. Shortly afterward, however, the United States Supreme Court began to also treat facts affecting a defendant's maximum sentence for a crime as "elements" that had to be submitted to a jury and proven under the standard set forth in Winship. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (holding factual issue of whether a defendant who committed intentional homicide was guilty of manslaughter or murder was subject to Winship standard of proof because manslaughter carried "substantially less severe penalties"); see also McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (recognizing that "in certain limited circumstances Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged").

The United States Supreme Court clarified this expansion of Winship in Apprendi v. New Jersey. 530 U.S. 466, 476 (2000). In Apprendi, the United States Supreme Court considered the constitutionality of a New Jersey sentence enhancement statute. 530 U.S. at 468-69. The statute increased the prison sentence of a defendant convicted for possession of a firearm for an unlawful purpose, if the sentencing judge found by a preponderance of the evidence that the defendant "'in committing the crime acted with a [biased] purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id. at 469 (quoting former N.J. Stat. Ann. § 2C:44-3(e)). The United States Supreme Court concluded the sentence enhancement statute contravened Winship because it only required that a finding of biased purpose be

proven to a judge by a preponderance of the evidence. Id. at 495. The United States Supreme Court reasoned that because a finding of biased purpose increased a defendant's statutory maximum sentence for the possession of a firearm for an unlawful purpose, it was "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Id. at 494 n.19 (emphasis added). Hence, the United States Supreme Court concluded that the question of biased purpose was an "element" that had to be proven to a jury beyond a reasonable doubt. Id. at 491. Speaking more generally, the United States Supreme Court held that any "fact that [similarly] increases the penalty for a crime beyond the prescribed statutory maximum" effectively constitutes an "element" that must be "submitted to a jury, and proved beyond a reasonable doubt" pursuant to Winship. Id. at 490.

Two years later in Ring v. Arizona, the United States Supreme Court applied these principles to the capital sentencing context. 536 U.S. 584, 586 (2002). In Ring, the United States Supreme Court considered the constitutionality of Arizona's capital sentencing scheme. Unlike Nevada, Arizona at the time was a non-weighing state, where a person could be found death-eligible merely if "at least one aggravating factor [wa]s found to exist [by a judge] beyond a reasonable doubt." Ring, 536 U.S. at 597 (internal quotation marks omitted).[2] Without this determination, Arizona statutes provided that the maximum penalty that a defendant could receive was life imprisonment. Id. The question presented in Ring was whether the existence of an

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

aggravating factor was an "element" of the offense of conviction that had to be found by a jury, not a judge, under the Sixth Amendment. Id.[3] Applying Apprendi, the United States Supreme Court concluded the existence of an aggravating factor in Arizona was the "'functional equivalent of an element of a greater offense'" because it constituted "a fact[] increasing punishment beyond the maximum authorized by a guilty verdict standing alone"—namely, life imprisonment. Id. at 605, 609 (quoting Apprendi, 530 U.S. at 494 n.19). Hence, the United States Supreme Court held that the existence of an aggravating factor had to be found by a jury, not a judge, under the Sixth Amendment. Id. at 609.

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

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

Prior to the United States Supreme Court's 2016 decision in Hurst v. Florida, there was no controlling authority establishing that Nevada's death-eligibility

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

requirement that mitigating circumstances not outweigh the aggravating circumstances was subject to the constitutional protections of the Due Process Clause and the Sixth Amendment. In fact, the Nevada Supreme Court had repeatedly held prior to Hurst that the weighing determination was not a "fact . . . 'that increases the penalty for a crime beyond the prescribed statutory maximum,'" for purposes of Ring and Apprendi. Nunnery v. State, 127 Nev. at 771, 263 P.3d at 250 (quoting Apprendi, 530 U.S. at 490); see also McConnell v. State, 125 Nev. at 254, 212 P.3d at 314-15, as corrected (July 24, 2009). The Nevada Supreme Court acknowledged that the weighing determination was a requirement for death-eligibility in Nevada and, thus, increased the statutory maximum punishment that a defendant could face. Nunnery, 127 Nev. at 772, 263 P.3d at 251. However, the Nevada Supreme Court characterized the weighing determination as "a moral determination rather than a factual determination," that "asks the sentencing body to balance facts that have already been found (aggravating and mitigating circumstances) in order to reach a conclusion or judgment." Id. at 775, 263 P.3d at 253. Because it did not constitute a "fact" increasing defendants' statutory maximum punishment, the Nevada Supreme Court rejected a constitutional claim that the weighing determination had to be proven beyond a reasonable doubt under Ring and Apprendi. Id.

The United States Supreme Court's decision in Hurst effectively overruled Nunnery. Hurst establishes that the weighing determination is a "fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." 136 S. Ct. 616, 620 (2016) (internal citation, alteration, and quotation marks

omitted). Consequently, under Winship, Apprendi, and Ring, the weighing determination is an "element" of the offense of conviction that must be proven beyond a reasonable doubt.

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

The United States Supreme Court in Hurst concluded Florida's "hybrid" system violated the Sixth Amendment because it required a judge, not a jury, to determine whether Florida's two death-eligibility requirements had been satisfied. The United States Supreme Court noted that under Florida statutes, "the maximum

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

Hurst overruled Nunnery because it held that a determination that mitigating circumstances do not outweigh aggravating circumstances, when required to impose a death sentence, must be proven to a jury beyond a reasonable doubt. 136 S. Ct. at 620. Hurst expressly found Florida's scheme defective under the Sixth Amendment because a judge, not a jury, was required under Florida statutes to determine both

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

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

The plain language of Hurst belies the State's argument. The United States Supreme Court in Hurst repeatedly stated Florida's death penalty scheme was defective because it required a judge, rather than a jury, to determine both of the eligibility findings necessary to impose a death sentence under Florida law. Speaking in the plural, Hurst stated Florida's death penalty scheme was unconstitutional

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

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

As set forth in Section III.C., Hurst holds that the weighing determination in Nevada is an "element" of the offense that must be proven by the State beyond a reasonable doubt. As a result, Castillo's death sentence must be vacated. At Castillo's 1996 penalty trial, the jury was instructed that it could "impose a sentence of death only if it finds . . . that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." See Instruction No. 7. However, the trial court failed to instruct the jury that it could only impose a death

sentence on Castillo if it concluded the State had proven this fact beyond a reasonable doubt. The trial court's error was structural because it pertained to the burden of proof required to establish an element of Castillo's offense under Winship. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (holding trial court's failure to properly instruct jury regarding prosecution's burden of proving an element of the offense beyond a reasonable doubt constituted structural error). Accordingly, Castillo's death sentence must be vacated.

E. Castillo's Death Sentence Must Be Vacated Because The Nevada Supreme Court Engaged in Improper Appellate Reweighing

Moreover, Hurst holds that the trial court's error was not cured by the Nevada Supreme Court's subsequent reweighing of the aggravating and mitigating circumstances during Castillo's habeas proceedings in November 2013. See Ex. 2 to Pet. (Order Denying Rehearing). In its 2013 decision, the Nevada Supreme Court struck two of Castillo's four aggravators as legally invalid. Id. at 1. However, after "reweighing" the remaining aggravators against the mitigation evidence, the Nevada Supreme Court concluded "the jury would have concluded that the mitigating circumstances did not outweigh the valid aggravating circumstances." Id. at 2-3. Under Hurst, the Nevada Supreme Court's reweighing did not cure the trial court's original error, on two grounds. First, the Nevada Supreme Court's decision did not apply Winship's beyond-a-reasonable-doubt standard when reweighing Castillo's death eligibility, effectively repeating the error committed by the trial court. Second, and more importantly, the Nevada Supreme Court's reweighing of Castillo's death-eligibility was constitutionally inadequate because Hurst established that the

weighing determination must be conducted by a jury, rather than a judge, under the Sixth Amendment. Hurst, 136 S. Ct. at 622. Hence, the Nevada Supreme Court's reweighing of Castillo's death-eligibility in November 2013 did not cure the trial court's original structural error.

And to the extent the Nevada Supreme Court also recited a harmless error standard in denying Castillo's claim—concluding "beyond a reasonable doubt" that the jury would have returned a death sentence after considering the evidence as a whole, Ex. 2 at 3, such an analysis was flawed because it was infected by the improper and unconstitutional reweighing analysis. The harmless error finding only encompassed, at most, the issue of the jury's selection of a death sentence. It did not encompass the eligibility finding which must be made by the jury. The Nevada Supreme Court's decision in Castillo's case was consistent with its practice of intermixing reweighing and harmless error. The state court therefore failed to provide close appellate scrutiny of Castillo's death sentence, and violated Hurst.

In Clemons v. Mississippi, 494 U.S. 738, 741 (1990), the United States Supreme Court addressed whether, under the Constitution, an appellate court may affirm a death sentence founded, in part, on an invalidated aggravating circumstance. The Clemons court sanctioned two different approaches: (1) the appellate court may independently review the evidence in aggravation and mitigation and affirm if the court concludes, under the statutory standard, a death sentence is factually supported; or (2) the court may conduct a harmless error analysis under Chapman v. California, 386 U.S. 18, 24 (1967).

Only the second of these alternatives, however, remains viable after Hurst. Clemons' approval of appellate reweighing was founded in the United States Supreme Court's pre-Apprendi jurisprudence, which permitted judicial factfinding in capital sentencing. A simple reading of Clemons' rationale starkly reveals the constitutional deficiencies of this approach:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Id. at 745 (emphasis added).

Appellate re-weighing was deemed permissible in Clemons only because the 1990 Court generally approved judicial factfinding in capital sentencing. This conclusion, substantially undermined in Ring, was eviscerated in Hurst. Because Hurst held impermissible any judicial factfinding in capital sentencing, including judicial determinations about the relative weight of aggravating and mitigating circumstances, it is a clear violation of the Sixth Amendment for an appellate court to independently reweigh aggravating and mitigating circumstances and, based on its own conclusions about these facts, affirm a sentence of death.

IV. HURST APPLIES RETROACTIVELY TO CLAIMS ONE AND THREE

The State also argues that Hurst does not apply retroactively to the judgment against Castillo. Resp. at 9-10. The State contends Hurst is a mere application of Ring

v. Arizona and cannot apply retroactively. Id. In support, the State notes the United States Supreme Court held in Schriro v. Summerlin, 542 U.S. 348 (2004), that Ring is not retroactive. Id. at 10. As set forth below, the State's argument is meritless.

A. Legal Standard

The United States Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989), sets forth a framework for determining when a new rule of constitutional law applies to cases on federal collateral review. Under Teague, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity. First, "[n]ew substantive rules generally apply retroactively." Schriro, 542 U.S. at 351. Substantive rules include rules that "alter[] the range of conduct or the class of persons that the law punishes" or "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Id. at 352, 354 (internal citation and quotation marks omitted). Second, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. Saffle v. Parks, 494 U.S. 484, 495 (1990). To have retroactive effect, the procedural rule "must be one without which the likelihood of an accurate conviction is seriously diminished." Schriro, 542 U.S. at 353 (emphasis omitted).

The Nevada Supreme Court has described Teague's framework as "strict[]" and "severe[]." Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 471 (2002). Hence, the

Nevada Supreme Court has chosen "to adopt [Teague] with some qualification," when assessing whether new rules of constitutional law apply retroactively to cases on state collateral review. Id. Under the Nevada Supreme Court's more relaxed retroactivity approach, new procedural rules need not be of "watershed" significance to merit retroactive application, as they must under Teague. Id. at 820, 59 P.3d at 472. Instead, if the accuracy of the proceedings is "seriously diminished" without the rule, the rule will apply retroactively to cases on state collateral review, whether or not they are of "watershed" importance. Id.

B. Hurst Announced A New Rule That Applies Retroactively

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

The United States Supreme Court has applied Winship's beyond-a-reasonable-doubt standard retroactively in two decisions pre-dating Teague: (1) Ivan V. v. City of N.Y., 407 U.S. 203 (1972); and (2) Hankerson v. North Carolina, 432 U.S. 233 (1977).[4] In both of these decisions, the United States Supreme Court considered whether Winship and subsequent decisions expanding its scope should apply

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

retroactively based on the pre-Teague standard for retroactivity set forth in Linkletter v. Walker, 381 U.S. 618 (1965). Retroactive application of new rules under the Linkletter standard was based on considerations similar to those later set forth in Teague. Under the Linkletter standard, a new rule was to be applied retroactively if the purpose of the new rule was "to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). In Ivan V. and Hankerson, the United States Supreme Court applied this pre-Teague standard and concluded Winship and subsequent decisions expanding its scope should apply retroactively.

First, in Ivan V., the United States Supreme Court held that Winship's beyond-a-reasonable-doubt standard applied retroactively to juvenile delinquency cases where conviction by the factfinder was not predicated upon the prosecution's burden to prove the elements of a crime beyond a reasonable doubt. Ivan V., 407 U.S. at 203-04. The United States Supreme Court concluded retroactive application of the Winship standard was warranted in these cases because it "overc[a]me an aspect of a criminal trial that substantially impairs the truth-finding function." Id. at 204. The United States Supreme Court described Winship's beyond-a-reasonable-doubt standard as "a prime instrument for reducing the risk of convictions resting on factual error." Id. Because it required that "no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt," the

United States Supreme Court stated the Winship standard "provide[d] concrete substance for the presumption of innocence." Id. at 204-05 (internal citation and quotation marks omitted). The Winship standard was so fundamental to the administration of justice that the United States Supreme Court described it as the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Id. (internal citation and quotation marks omitted). Hence, the United States Supreme Court retroactively applied the Winship standard. Id.

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

aspect of a criminal trial that substantially impairs the truth-finding function." Hankerson, 432 U.S. at 242.

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

Second, the new rule set forth in Hurst must also apply retroactively as a procedural rule. As noted previously, under the Nevada Supreme Court's retroactivity test, a new procedural rule need not be a "watershed" rule to apply retroactively: the only requirement for retroactive application is that "accuracy [would be] seriously diminished without the rule." Colwell, 118 Nev. at 820, 59 P.3d at 472. Ivan V. and Hankerson demonstrate that the new rule set forth in Hurst

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

C. Schriro v. Summerlin Is Inapposite

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

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

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

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

V. THE AVOID OR PREVENT LAWFUL ARREST AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY APPLIED TO CASTILLO (CLAIM TWO)

In Claim Two of his Petition, Castillo argues that his death sentence was invalid under both the state and federal Constitutions due to the Nevada Supreme Court's arbitrary and capricious application of the avoid or prevent a lawful arrest aggravating circumstance in his case, NRS 200.033(5), and because of the insufficiency of the evidence to support the aggravator. Pet. at 19-22. In its Response, the State argues the evidence supports the aggravator and further argues the aggravator is constitutional. Resp. at 17-18. On both counts the State is incorrect.

First, the avoid or prevent a lawful arrest aggravator had no factual basis. Said another way, there was little evidence that Castillo feared the victim's ability to identify him. In fact, the victim was not at home when Castillo repaired her roof prior to the offense, and thus, the victim had never seen Castillo or even knew who he was. See 8/29/96 a.m. TT at 10, 27 (victim's daughter stating the victim "spent Thanksgiving with us and I believe that during that weekend was when the roof was being put on"). In addition, when Kirk Rasmussen, a witness who alleged Castillo confessed to him, was asked: "Did he tell you whether he was concerned that [the victim] might wake up and see his face?" Rasmussen answered "No, he didn't say that." 9/3/96 a.m. TT at 122. Thus, the aggravator for avoiding or preventing lawful arrest lacked sufficient evidence. Compare Canape v. State, 109 Nev. 864, 874-75, 859 P.2d 1023, 1030 (1993).

Further, the mere fact that a felony underlying a felony murder conviction has been committed against the victim is insufficient to conclude that the killing was committed to avoid or prevent lawful arrest, otherwise the aggravator would be inherent in every felony murder, a proposition the Nevada Supreme Court has rejected. See, e.g., Bennett v. Eighth Judicial District Court, 121 Nev. 802, 806, 121 P.3d 605, 608 (2005) (noting that trial court struck the aggravator in felony murder case as "unsupported by the evidence"). As in Bennett, here the facts similarly reveal nothing more than a felony murder conviction as a basis for the aggravating factor.

The State argues that the Nevada Supreme Court has previously rejected a similar challenge. Resp. at 17. However, the Nevada Supreme Court's refusal to apply

a narrowing construction every time it has been asked to consider one as to this aggravator has eradicated any apparent "common sense core meaning that criminal juries should be capable of understanding," rendering it unconstitutionally vague under the Eighth Amendment. Tuilaepa v. California, 512 U.S. 967, 973-74 (1994); see Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). See also Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986) (refusing to require an imminent arrest or that victim was in some way involved in effectuating an arrest); Evans v. State, 112 Nev. 1172, 1196, 926 P.2d 265, 280-81 (1996) (rejecting requirement that avoiding arrest be the dominant motive; rejecting requirement that victim be able to identify defendant). Because the avoid arrest aggravator has no meaning or proof requirements, it is inadequate to fulfill the narrowing function required by the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980).

This aggravator is overbroad because a person of ordinary sensibility could fairly characterize every felony murder as motivated by a desire to eliminate the witness to the felony to avoid or prevent a lawful arrest. See Godfrey, 446 U.S. at 428-29. And because the Nevada Supreme Court's application of the aggravator is arbitrary and capricious, it is indistinguishable from that struck in Godfrey. See Walton v. Arizona, 497 U.S. 639, 653 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002) (discussing significant features of the aggravator struck down in Godfrey that are equally applicable to the aggravator at bar).

"In a weighing state where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight

to an unconstitutionally vague aggravating factor, even if other aggravating factors remain." McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995). The invalid prevent lawful arrest aggravator undoubtedly had a prejudicial effect on the jury's death-eligibility determination, because it related to circumstances of the capitally-charged offense. See Sechrest v. Ignacio, 549 F.3d 789, 814 n.13 (9th Cir. 2008).

VI. CONCLUSION

For these reasons, and those cited in the Petition, Castillo is entitled to a new sentencing hearing.

DATED this 8th day of March, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
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Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

Steven S. Owens
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 96C133336-1 DEPT NO: XIX

REPLY TO OPPOSITION
DATE OF HEARING: 4/17/17
TIME OF HEARING: 8:30 AM

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

This 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.

POINTS AND AUTHORITIES

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

the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." Opposition, p. 14. This is false. It is one thing to argue for an extension of law based on existing precedent, but quite another to misrepresent the holding of a case. Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

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

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

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

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

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

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

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

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

Nor did the Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985). The Court has repeatedly recognized that the purpose of weighing is to protect a defendant's Eighth Amendment right to an individualized sentencing determination and is a moral judgment that goes to sentence selection, not eligibility. *See*, e.g., Boyde v. California, 494 U.S. 370, 376-77, 110 S. Ct. 1190, 1196 (1990) (acknowledging that the challenged jury instruction "was consistent with the Eighth Amendment, because a reasonable juror would interpret the instruction as allowing for the exercise of discretion and moral judgment about the appropriate penalty in the process of weighing the aggravating and mitigating circumstances."). Defendant has misinterpreted and misrepresented the holding of Hurst.

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

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

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

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

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

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

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

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

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

Dated this 22nd Day of March, 2017.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

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

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

DAVID ANTHONY
Email: david_anthony@fd.org

BRAD D. LEVENSON
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TIFFANY L. NOCON
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By: */s/ E.Davis*
Employee, District Attorney's Office

SSO//ed

Electronically Filed
5/10/2017 3:00 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	)	CASE NO. 96C133336-1
vs.	)	DEPT. NO. XIX
WILLIAM PATRICK CASTILLO, Defendant.	)	**TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE

WEDNESDAY, MAY 3, 2017 AT 8:58 A.M.

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION; STATE'S RESPONSE AND MOTION TO DISMISS THIRD HABEAS PETITION

APPEARANCES:

FOR THE STATE: STEVEN OWENS
Deputy District Attorneys

FOR THE DEFENDANT: BRAD LEVENSON
TIFFANY NOCON
Federal Public Defenders

Recorded by: CHRISTINE ERICKSON, COURT RECORDER

Case Number: 96C133336-1

LAS VEGAS, NEVADA, WEDNESDAY, MAY 3, 2017 at 8:58 A.M.

THE COURT: State of Nevada versus William Castillo.

MR. OWENS: Good morning, Judge; Steve Owens for the State.

MS. NOCON: Good morning, Your Honor. Tiffany Nocon from the Federal Public Defender's office. With me is Brad Levenson also from the Federal Defender's office.

Mr. Castillo is in custody at Ely State Prison. He waives his appearance today.

THE COURT: Okay. This is kind of interesting here. I had an opportunity to review the case further. I wanted to also talk to my -- some fellow associates here on the bench that have been addressing somewhat similar arguments here.

Basically the -- I guess the position that I would start with is that I'm making a finding here. I mean I'll let the parties argue if they wish. Do you have anything further that you want to address with the Court?

MS. NOCON: Yes, Your Honor. I'd like to highlight a main point of contention between the State and Mr. Castillo and that is whether Hurst is a mere application of Ring.

THE COURT: Right.

MS. NOCON: And Hurst is not a mere application of Ring. Ring concerned Arizona which is a non-weighing state; an Arizona statute which had the beyond the reasonable doubt standard built in.

Hurst dealt with Florida which is a weighing state just like Nevada is a weighing state. Florida statutory scheme lacks the built in

beyond the reasonable doubt standard just like Nevada statutory scheme lacks that. And that's why Hurst is expanding protections for criminal defendants beyond what Ring told us. Hurst is expanding those protections to weighing states without the statutory built in beyond the reasonable doubt standard.

THE COURT: Anything else?

MS. NOCON: Your Honor, Mr. Castillo's position is also that latches doesn't apply because he couldn't of brought this claim before Hurst issuance and that was beyond his control.

THE COURT: Okay. Mr. Owens, did you want to address the Court?

MR. OWENS: I'll submit it, Judge.

THE COURT: Okay. All right. It's the Court's decision here today that I disagree with your reading of Hurst. I -- and the Ring decision. I do believe that Hurst is applying the Ring decision as an application of the Ring versus Arizona decision. And also I don't believe that it -- the Hurst case even applies or even the Ring applies retroactively.

My position is is that your failure to raise this in a previous complaint would amount to -- similar to a waiver. However, irrespective of that, if I find that the Hurst doesn't apply here or the -- because of the Ring decision then you're barred under our statute. Under our -- procedurally barred under NRS 34.

I don't believe that -- I mean the argument that you make is to get the Court to apply the Hurst decision but I don't believe that that's good cause for the delay here. And so for those reasons I'm denying your petition. Okay?

MS. NOCON: Very well, Your Honor.

MR. OWENS: Thank you.

THE COURT: I'm going to ask that the State prepare a decision consistent with your opposition here.

MR. OWENS: Okay.

THE COURT: There's three -- I didn't address -- I mean not procedurally, but substantively, I didn't address the other arguments because I believe the procedural bar closes those out.

MR. OWENS: Okay.

THE COURT: So I wanted to address whether or not there was good cause under -- for their -- for waiving their procedural bar because of the Hurst decision. And their applicability of the Hurst decision. Or their argument for the Hurst decision.

That's the only way I see it as how they get around that.

MR. OWENS: So no good cause to overcome the one year time bar --

THE COURT: Right.

MR. OWENS: -- in the successive petition bar?

THE COURT: Right.

MR. OWENS: Okay.

THE COURT: Okay? All right. Thank you.

MS. NOCON: And, Your Honor, to request a transcript do you think we can do that with your chambers or --

THE COURT: What's that?

MS. NOCON: To request a transcript of this do we do that --

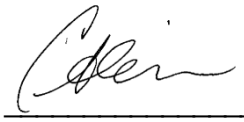
THE COURT: Just submit an order.

MS. NOCON: Okay.

[PROCEEDINGS CONCLUDED at 9:02 A.M.]

* * * * *

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



Christine Erickson,
Court Recorder

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, vs. THE STATE OF NEVADA, Respondent,	Case No: 96C133336-1 Dept No: XIX **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

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

☑ The United States mail addressed as follows:

William P. Castillo # 51918 P.O. Box 1989 Ely, NV 89301	Rene L. Valladares, FPD 411 E. Bonneville, Ste 250 Las Vegas, NV 89101	David Schieck, SPD 330 S. Third St., 8th Floor Las Vegas, NV 89155

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FFCL
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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 96C133336-1 DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 5/3/17
TIME OF HEARING: 8:30 AM

This Cause having come on for hearing before the Honorable WILLIAM D. KEPHART, District Judge, on the 3rd day of May, 2017, the Petitioner not being present, represented by BRAD LEVENSON and TIFFANY NOCON, Assistant Federal Public Defenders, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 1996, William Castillo was convicted and sentenced to death for beating an 86-year old woman in the head with a tire iron and then smothering her as she lay sleeping in her bed while Castillo and an accomplice burglarized her home, robbed her of a VCR, money, and silverware, and then set fire to the house in order to destroy evidence. Castillo v. State, 114

Nev. 271, 956 P.2d 103 (1998). The convictions and death sentence were affirmed on direct appeal and remittitur issued on April 28, 1999. Id.

Castillo timely filed his first state post-conviction petition on April 2, 1999, which was denied after an evidentiary hearing and affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC #40982). Remittitur issued on October 27, 2004. After five years of federal habeas litigation, Castillo returned to state court in a second state habeas petition filed on September 18, 2009. That petition was also denied and again affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 56176). Remittitur issued on December 17, 2013. Since then, Castillo continued his federal habeas litigation and currently has a petition pending in federal court. On January 6, 2017, Petitioner filed his third state habeas petition which raises issues based on Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). The State has filed a response and motion to dismiss the petition based on procedural default.

This Court finds that the instant petition, which is a third petition for a writ of habeas corpus by this Petitioner, is untimely and successive and constitutes an abuse of the writ, and those procedural defaults can only be overcome by a showing of good cause and prejudice. NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, 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. NRS 34.810.

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).

Petitioner asserts that the Hurst v. Florida case provides that good cause. However, this Court disagrees with Petitioner's reading of Hurst and the Ring decisions. *See* Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). This Court believes that Hurst is applying the Ring decision and does not do so retroactively. Petitioner's failure to raise this in a previous petition amounts to a waiver. Hurst does not apply here and because of the Ring decision Petitioner is procedurally barred under NRS Chapter 34. Hurst does not constitute good cause for the delay.

Additionally, the U.S. Supreme Court has found Ring not to be retroactive and Hurst, being an application of Ring, also would not be retroactive for the same reasons as previously discussed by the U.S. Supreme Court in reaching the conclusion that Ring is not retroactive. *See* Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S.Ct. 2519, 2522-27 (2004) ("Ring announced a new procedural rule that does not apply retroactively to cases already final"). So, for those reasons, this Court finds that Hurst does not constitute good cause to excuse the procedural defaults.

Additionally, the State has asserted a defense of laches which has not been rebutted. NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." It is the same Hurst argument effectively asserted by the defense to overcome the defense of laches and for the reasons previously stated, this Court finds that does not overcomes that defense.

ORDER

Based on the foregoing, the third petition is untimely, presumptively prejudicial, waived and abusive without good cause and prejudice to overcome the procedural defaults. The motion to dismiss the petition is granted.

DATED this 30th day of May, 2017.

WILLIAM KEPHART
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

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

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 18th day of May, 2017, by Electronic Filing to:

DAVID ANTHONY
BRAD D. LEVENSON
TIFFANY L. NOCON

Email: ecf_nvchu@fd.org

By: E Lewis

Employee, District Attorney's Office

SSO//ed

Eileen Davis

From:	Eileen Davis
Sent:	Thursday, May 18, 2017 3:09 PM
To:	ecf_nvchu@fd.org
Cc:	Steven Owens; Eileen Davis
Subject:	William P. Castillo, 96C133336-1, Findings.
Attachments:	Castillo, William P., 96C133336-1, FFCL&O..pdf

The attached Findings will be submitted to the Judge on May 25, 2017.

NOAS

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, v. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Nevada Attorney General, Respondents.	Case No. C-133336 Dept. No. XIX **NOTICE OF APPEAL** (Death Penalty Habeas Corpus Case)

NOTICE IS HEREBY GIVEN that the Defendant, William P. Castillo, appeals to the Nevada Supreme Court from the Order Dismissing Petition for Writ of Habeas

/ / /

/ / /

Corpus (Post-Conviction) filed in this action on June 5, 2017.

DATED this 5th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Brad D. Levenson
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CERTIFICATE OF SERVICE

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

Steven S. Owens
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Eileen.davis@clarkcountyda.com

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