IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 73465

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Pursuant to NRAP 17(a)(2), this appeal is retained by the Supreme Court because it is a postconviction appeal in a death penalty case.

STATEMENT OF THE ISSUES

Whether Hurst v. Florida constitutes good cause for a procedurally barred habeas petition in a capital case on grounds that it is new case authority requiring application of the beyond-a-reasonable-doubt standard to the weighing of aggravating and mitigating circumstances and prohibiting harmless error review or

e-weighing by an appellate court. *See* Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016).[1]

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.; AA 169-70.

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April 2, 1999, which was denied after an evidentiary hearing and affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC #40982). AA 36-40, 170. Remittitur issued on October 27, 2004. Id. After five years of federal habeas litigation, Castillo returned to state court in a second state habeas petition filed on September 18, 2009. AA 40-2, 170. That petition was also denied and again affirmed on appeal by the

[1] The federal public defender has raised or is expected to raise this same issue in a number of capital appeals to include the following: Samuel Howard (SC# 73223), Jose Echavarria (SC# 73224), Joseph Smith (SC# 73373), William Witter (SC# 73431), Rodney Emil (SC# 73461), William Castillo (SC# 73465), Fernando Hernandez (SC# 73620), Robert Byford (SC# 73691), Donald Sherman (SC# 73984), Kitrich Powell (SC# 74168), Travers Greene (SC# 74458), Antonio Doyle (SC# 74600). Several more cases with this issue are still pending in district court.

Nevada Supreme Court in an unpublished order (SC# 56176). AA 59-67, 170. Remittitur issued on December 17, 2013. Id. Since then, Castillo continued his federal habeas litigation and currently has a petition pending in federal court. AA 42-3.

Several years later, Appellant once again returned to state court this time with his third state habeas petition which raised a single issue based on Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). AA 31-57. The State filed a response and motion to dismiss. AA 73-91. Appellant filed an Opposition, AA 112-154, and the State filed a Reply, AA 155-162. The judge heard argument and denied the third habeas petition by written order giving rise to the instant appeal. AA 163-175.

SUMMARY OF ARGUMENT

Hurst simply does not say what the federal public defender thinks or wishes that it said. Hurst does not hold or even suggest that the beyond-a-reasonable-doubt standard applies to the weighing of aggravating and mitigating circumstances or that an appellate court can no longer conduct harmless error analysis after striking an invalid aggravator. This Court's prior authority has already resolved these issues against Appellant's position and Hurst provides no good cause to revisit those rulings or to overcome the procedural bars. Instead, Hurst is nothing more than a straight-forward application of Ring v. Arizona to Florida's death penalty scheme which had required not the jury but a judge to make the critical findings necessary

to impose the death penalty. Because Hurst does not constitute intervening authority giving rise to a new claim not previously available, Appellant failed to show good cause or prejudice for an untimely and successive habeas petition and the district court judge did not err in denying it.

ARGUMENT

The district court judge correctly denied the third habeas petition as untimely, presumptively prejudicial, waived and abusive without good cause and prejudice to overcome procedural defaults pursuant to NRS 34.726, NRS 34.800, and NRS 34.810. AA 170-1. Hurst does not provide good cause to overcome these bars. Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016).

Recently, this Court agreed with the State's position on this issue and held that Hurst did nothing more than apply Ring and Apprendi to Florida's death penalty procedure and made no new law relevant to Nevada. Jeremias v. State, No. 67228, 2018 Nev. LEXIS 10, 134 Nev.Adv.Rep. 8 (Mar. 1, 2018). Contrary to opposing counsel's interpretation, the Court in Hurst was, "not pronouncing a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond-a-reasonable-doubt standard." Id. Rather, the law in Nevada remains that although the weighing process is a prerequisite of death eligibility, it is more accurately described as part of the individualized sentence selection process and a defendant is rendered death eligible once the jury finds the existence of one or

more aggravating circumstances beyond a reasonable doubt. Id. Although Jeremias alone is sufficient authority to dispense with Appellant's argument, the following is offered in further support of the district court's decision.

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. AA 169-70. Therefore, Petitioner had until April 28, 2000, to file a timely habeas petition. Petitioner filed the Third Petition on January 6, 2017. AA 31. As such, the Third Petition is time barred.

Even if the one-year rule did not begin to run until Appellant'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." AA 53. Appellant premises this contention upon Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). AA 43. It is

indisputable 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 Appellant failed to raise it within one year of Ring's publication. The district court judge correctly applied the one-year time bar in denying the petition below. AA 170.

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). The State raised this bar in its Response and Motion to Dismiss. AA 76. More than five years has passed since remittitur issued from Petitioner's direct appeal on April 28, 1999. AA 169-70. Indeed, over 17 years have passed since Petitioner's direct appeal was final. As such, the State pleaded 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 Appellant's third go around on state post-conviction review was not dismissed or denied on the procedural bars, the State would have been 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. The district court was correct in basing dismissal of the petition in part on NRS 34.800. AA 171.

D. NRS 34.810

Appellant's third attempt at state habeas relief was also properly dismissed on waiver grounds and as an abuse of the writ. AA 170. 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.").

Appellant's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became available to him. Appellant's contention is that a new penalty hearing is required because of Hurst. AA 58-72. It is indisputable 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. Appellant's failure to raise this complaint by June 24, 2003, amounts to a waiver. Appellant could have raised his Ring complaint during the litigation of his prior petitions or he could have filed an additional petition raising this contention. This complaint could have been presented to this Court at any point after June 24, 2002. Appellant's failure to do so renders his claim procedurally barred under NRS 34.810.

II. Failure to Overcome the Procedural Bars

Appellant is unable to overcome the procedural bars because Appellant has failed to prove good cause and substantial prejudice. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish

prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. __, __, 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

Appellant argues that Hurst held the weighing determination, like the finding of an aggravating circumstance, constitutes an "element" of the offense that must be proven by the State beyond a reasonable doubt. This interpretation of Hurst is farfetched and disingenuous. It is one thing to argue for an extension of law based on existing precedent, but quite another to misrepresent the holding of a case.

Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

The United States Supreme Court 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 Appellant'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.

Although this Court has not yet had occasion to opine on the Hurst decision, many other state courts have rejected an interpretation of Hurst that would extend the beyond-a-reasonable-doubt standard to the weighing determination:

> Importantly, the [Hurst] opinion did not hold that weighing must be done beyond a reasonable doubt. Indeed Hurst says nothing at all about whether the weighing of aggravating and mitigating circumstances must be determined beyond a reasonable doubt. And Leonard points to no such discussion. Instead he parses the language of Hurst to infer the Court's meaning.

Leonard v. State, 73 N.E.3d 155, 169 (Ind. 2017).

> With regard to the first contention — that Hurst requires that the jury's ultimate sentencing decision be made "beyond a reasonable doubt" — Hurst simply does not say this, neither explicitly nor implicitly. The issue before the Hurst Court was not the burden of proof required for a fact-finder to fix a defendant's sentence at death; rather, the issue before the Hurst Court was the identity of that fact-finder. Hurst applied

> Apprendi and Ring to Florida's capital sentencing statutory scheme by holding that it was the jury, not the judge that must make the findings necessary to expose a defendant to a greater sentence. A sentencing scheme that consigned the jury to a merely advisory role was constitutionally defective.

Commonwealth v. Lawlor, No. FE-2009-304, 2017 Va. Cir. LEXIS 36, at *46 (Cir. Ct. Mar. 6, 2017); Evans v. State, No. 2013-DP-01877-SCT, 2017 Miss. LEXIS 249, at *78 (June 15, 2017) ("The Hurst decision did not rest upon or even address the beyond-a-reasonable-doubt standard"); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute . . . does not require . . . findings beyond a reasonable doubt . . . that the aggravating factors outweighed the mitigating factors. . . . . Nothing in Hurst . . . affects our conclusions in this regard."); People v. Jones, 3 Cal. 5th 583, 618-619, 220 Cal.Rptr.3d 618, 398 P.3d 529 (2017); Ex parte Bohannon, 222 So.3d 525, 532-533 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio-8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Appellant's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. The United States Supreme Court allowed the rejection of Appellant's argument by the California and Alabama Supreme Courts to stand. If the High Court

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

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

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

Leonard v. Filson, D.Nev. No. 2:99-cv-0360-MMD-CWH, 2017 U.S. Dist. LEXIS 132801, at *6 (Aug. 18, 2017); *see also* Emil v. Filson, D.Nev. No. 3:00-cv-00654-KJD-VPC, 2017 U.S. Dist. LEXIS 175609, at *3-5 (Oct. 22, 2017) ("Emil's claim extends the holding in Hurst well beyond its cognizable bounds. Hurst does not hold, as Appellant claims, that the weighing aggravating and mitigating circumstances is an 'element' that must be submitted to the jury"; Castillo v. Filson, D.Nev. No. 2:04-cv-00868-RCJ-GWF, 2017 U.S. Dist. LEXIS 151955, at *13-16 (Sep. 18, 2017) ("Castillo's claim extends the holding in Hurst beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing of aggravating and mitigating circumstances is an 'element' that must be submitted to the jury"); Hernandez v. Filson, D.Nev. No. 3:09-cv-00545-LRH-WGC, 2017 U.S. Dist. LEXIS 147103, at

*3-6 (Sep. 11, 2017) ("Hernandez's claims extend the holding in Hurst beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing of aggravating and mitigating circumstances is an 'element' that must be submitted to the jury, or to which the reasonable doubt standard must apply"); Sonner v. Filson, D.Nev. No. 2:00-cv-01101 KJD-CWH, 2017 U.S. Dist. LEXIS 139462, at *56-58 (Aug. 25, 2017) ("[D]espite Sonner's construction of the cases to the contrary, none of the U.S. Supreme Court cases he cites [including Hurst] support his contention that the weighing determination is a 'fact' that must be submitted to a jury or found beyond a reasonable doubt"); Smith v. Filson, No. 2:07-CV-00318-JCM-CWH, 2017 U.S. Dist. LEXIS 93395, at *5 n.3 (D. Nev. June 16, 2017) ("Moreover, this court views Hurst as simply the application of Ring to Florida's 'hybrid' capital sentencing scheme and is not convinced that it announced a new rule, much less one that imposes the beyond a reasonable doubt standard on the weighing of aggravating and mitigating circumstances").

Outside of Nevada, other federal courts are in agreement. Styers v. Ryan, D.Ariz. No. CV-12-02332-PHX-JAT, 2017 U.S. Dist. LEXIS 135724, at *6 (Aug. 24, 2017) ("Hurst did not impose a new beyond-a-reasonable-doubt standard on sentencing determinations in capital cases); Garza v. Ryan, No. CV-14-01901-PHX-SRB, 2017 U.S. Dist. LEXIS 4031, at *8-9 (D. Ariz. Jan. 11, 2017) ("Hurst does not hold, as Garza suggests, that a jury is required to find beyond a reasonable doubt that

the aggravating factors outweigh the mitigating circumstances. . . Hurst did not address the process of weighing the aggravating and mitigating circumstances); Runyon v. United States, No. 4:15cv108, 2017 U.S. Dist. LEXIS 15886, at *144-45 (E.D. Va. Jan. 19, 2017) ("Hurst does not mention the weight a jury should give to the aggravating and mitigating factors . . . . his attempt to link Hurst to his case stretches the holding too far"); Garcia v. Ryan, No. CV-15-00025-PHX-DGC, 2017 U.S. Dist. LEXIS 65806, at *9 (D. Ariz. May 1, 2017) ("Hurst does not hold, as Garcia suggests, that a jury is required to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances")

The Ninth Circuit has yet to conclusively resolve the issue in a reported decision, but has noted that it is "highly skeptical" of the argument that "Nevada's scheme is unconstitutional because it does not require the 'weighing determination' to be made beyond a reasonable doubt." Ybarra v. Filson, 869 F.3d 1016, 1030 (9th Cir. 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."). Well before Hurst, every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating

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

Nor did the Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985). 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."). Once again affirming that selection of a death sentence is not a factual finding, but ultimately a discretionary judgment not susceptible to a burden of proof, the United States Supreme Court, in an opinion filed just one week ***after*** Hurst, held as follows:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. ***And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.*** It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, ***leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof.*** If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they

> deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S. Ct. 633, 642 (2016) [emphasis added]; *see also* United States v. Sampson, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that Kansas v. Carr undermines the claim that Hurst requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard). Clearly, Appellant's interpretation of Hurst is against the great weight of authority.

Another strong reason to reject Appellant's dubious construction of Hurst is how the 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 Appellant's view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances is in direct conflict with Walton:

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

Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047, 3055 (1990) [emphasis added]. If the United States Supreme Court intended the holding Appellant 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.").

In the Rauf opinion cited by Appellant, the Delaware death penalty scheme was held unconstitutional because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity. Rauf v. State, 145 A.3d 430 (Del. 2016). While these decisions were "prompted" in part by the Hurst decision, the analysis actually required the court "to interpret not simply the Sixth Amendment itself, but the complex body of case law interpreting it," leading to "a diversity of views on exactly why the answers to the questions are what we have found them to be." Id. Specifically in regards to Question 4 which applies the reasonable doubt burden of proof to the weighing process, there's nothing in the Rauf opinion which cites to the Hurst case as the basis or reason for that particular decision. Id. In fact, the concurrences suggest that the beyond-a-reasonable-doubt standard applies to weighing because of historical analysis and the Delaware Constitution rather than as a direct requirement of Hurst. Id. at 481-2 (Strine, concur), 484-5 (Holland, concur).

Under Nevada law, weighing is only part of death "eligibility" to the extent a jury is precluded from imposing death if it determines that the mitigating

circumstances are sufficient to outweigh the aggravating circumstances. Lisle v. State, 131 Nev. ___, 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. Appellant 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). Appellant 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.

Appellant's failure to prosecute his Ring / Hurst complaint within one year of when it became available precludes a finding of good cause. Appellant's contention is that a new penalty hearing is required because of Hurst. AA 58-72. It is indisputable 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, Appellant had until June 24, 2003, to bring this claim. Appellant 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 Appellant during that nearly

fifteen year period. Appellant'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).

Appellant cannot demonstrate an impediment external to the defense since Ring has been readily available to him for nearly fifteen years. Appellant will undoubtedly argue that his change in law impediment should be counted from Hurst and not Ring. However, "[g]ood cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available." Bejarano v. State, 122 Nev. 1066, 1073, 146 P.3d 265, 270 (2006). The issue is when the legal basis arose for Appellant'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. Appellant 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").

Nor can Appellant 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 has represented Appellant since July 7, 2004. AA 40. Further, the decision to litigate in federal court does not excuse Appellant's failure to comply with Nevada's procedural default rules. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), abrogated on other grounds, Huebler, 128 Nev. at 197, footnote 2, 275 P.3d at 95, footnote 2. The district court judge correctly found that Hurst was an application of Ring and did not constitute new grounds for relief previously unavailable. AA 171.

B. No Prejudice

Appellant 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. The Hurst decision is not retroactive and Appellant received the process he was due under Ring.

1. Hurst is Not Retroactive

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 the 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, the Court concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S.Ct. at 2526-27.

Accordingly, several other courts have concluded that Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *See* Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("[U]nder federal law Hurst, like Ring, is not retroactively applicable on collateral review."); Lambrix v. Secretary, 872 F.3d 1170, 1182-1183 (11th Cir.2017) ("In Lambrix V, this Court already indicated that Hurst is not retroactively applicable on collateral review under federal law, and we hold here that no reasonable jurist would find that issue debatable"); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017) ("The Supreme Court has not held that its decision in Hurst is retroactively applicable to cases on collateral review."); In re Coley, 871

F.3d 455 (6th Cir. 2017); 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."). Given the conclusion that Hurst is nothing more than an application of Ring, it necessarily follows that Hurst is not retroactive the same as Ring.

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS 649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."). It is important to note that this burden of proof issue is the entire point of Appellant's argument. Third Petition, p. 24 ("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"). AA 54. This conclusion, by the only Court offering any support to Appellant'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). Appellant's conviction was final with the 1993 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 Appellant is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on appeal of the denial of his second habeas petition violated Hurst. AA 59-67. 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. Reasonable doubt standard does not apply to weighing

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 Apprendi challenge to the omission of the beyond-a-reasonable-doubt standard from Nevada's weighing instruction. Id.

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

outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. ___, 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 the Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," such review was constitutionally permissible. Id. at 754, 110 S. Ct. at 1451.

The 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).

Appellant's radical expansion of Ring and Hurst would require abandonment of Clemons. Such an outcome is contrary to the great weight of authority. Indeed, the United States Supreme Court has arguably already rejected Appellant's contention. Ring itself specifically noted that 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 Appellant received all the protections required by Ring, the judge below did not err in denying Appellant's Fourth Petition due to procedural defaults.

CONCLUSION

Based on the foregoing, the Third Petition is untimely, presumptively prejudicial, waived and abusive without good cause to overcome Appellant's procedural defaults. Appellant has failed to show that Hurst means what he claims it means or that it is retroactively applicable. Accordingly, Hurst itself does not represent any kind of intervening case law which can provide Appellant with good cause for his untimely and successive habeas petition.

Dated this 9th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,314 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of March, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 9, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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