IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

Appeal From Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable William D. Kephart, District Judge

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I. INTRODUCTION

For a defendant to be death eligible, Nevada law requires the jury to find that at least one aggravating factor exists and that mitigating evidence does not outweigh statutory aggravating factors. NRS 175.554(2)(a)(b), 200.030(4)(a). The jury is not permitted even to consider a death sentence until it makes both of these preliminary findings. See NRS 175.554(2)(c) (instructing juries to base final determination of sentence on findings regarding aggravating and mitigating circumstances). But the trial court instructed Mr. Castillo's jury that it needed to make only the first finding—that an aggravating factor existed—beyond a reasonable doubt. 1AA2, 8. Relying on Hurst v. Florida, 136 S. Ct. 616 (2016), Mr. Castillo has challenged the constitutionality of the lesser standard of proof used for the second eligibility finding and this Court's reweighing of the aggravating factors and mitigating evidence on appeal.

In its Answering Brief, the State contends that Hurst, like Ring v. Arizona, 536 U.S. 584 (2002), concerns only the first death-eligibility finding—the existence of at least one aggravating factor. See, e.g., Ans.

Br. at 12-15. But the plain language of Hurst requires that all death-eligibility determinations—all steps in a state's capital-sentencing scheme prior to the sentencer's ultimate choice between life and death—be proven to a jury beyond a reasonable doubt. See Hurst, 136 S. Ct. at 622 (criticizing Florida scheme for allowing judge to make both death-eligibility findings: "'[t]hat sufficient aggravating circumstances exist and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances'" (alterations in original) (quoting former Fla. Stat. § 921.141(3))).[1]

Although many jurisdictions require only one finding for death-eligibility—the existence of at least one aggravating factor—Nevada is "relatively unique," Lisle v. State, 131 Nev. __, 351

[1] This Court recently stated that, although this sentence from Hurst "appears to characterize the weighing determination as a 'fact,'" the United States Supreme Court was simply "quoting the Florida statute, 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." Jeremias v. State, 134 Nev. Adv. Op. 8, 412 P.3d 43, 53–54 (2018). But the Florida Supreme Court, on remand from Hurst, interpreted its own statutes and the United States Supreme Court's decision to mean that all eligibility findings, including the outweighing determination, are factual and subject to Hurst. Hurst v. State, 202 So. 3d 40, 53–58 (Fla. 2016), cert. denied sub nom. Florida v. Hurst, 137 S. Ct. 2161 (2017).

P.3d 725, 732 (2015), and its capital-sentencing scheme is uniquely affected under Hurst. Like Florida, but unlike most other states and the federal system, the Nevada legislature has enacted a three-part capital-sentencing process, which requires a finding that mitigating evidence does not outweigh aggravating factors as a condition of death eligibility. See Hollaway v. State, 116 Nev. 732, 745–46, 6 P.3d 987, 996 (2000). Only after the jury makes this finding can it move on to the ultimate sentencing determination—whether to impose a death sentence on a particular defendant, considering again the balance of aggravating factors and mitigating evidence, but also considering "any other matter which the court deems relevant to the sentence." NRS 175.552(3); see NRS 175.554(2)(c). Even then, however, every juror maintains the power to refuse to vote to impose a death sentence, no matter what the balance of aggravation against mitigation may be. See Bennett v. State, 111 Nev. 1099, 1109–10, 901 P.2d 676, 683 (1995).

This Court's recent decision in Jeremias v. State, 134 Nev. Adv. Op. 8, 412 P.3d 43, 53–54 (2018), which holds otherwise, was wrongly decided and should be reconsidered. Jeremias is incorrect for all the reasons the

State's arguments fail: it relies on Eighth Amendment jurisprudence rather than Sixth Amendment jurisprudence, ignores the uniqueness of Nevada's death-penalty scheme, and misunderstands the nature of the juries' determinations under the Nevada's capital-sentencing scheme.[2]

Consequently, under Nevada's "relatively unique" structure, the outweighing determination, because it is required for death eligibility, is an "element" of the capital offense, which under the retroactive new rule announced in Hurst must be found by a jury beyond a reasonable doubt. The jury during Mr. Castillo's penalty deliberations made that finding using a lesser standard of proof, and this Court, not a jury, reweighed aggravating factors and mitigating evidence on appeal. Thus, the district court erred in concluding that Mr. Castillo's petition was procedurally defaulted, based upon the supposed lack of merit of the Hurst claim, and denying relief.

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[2] Jeremias was issued on March 1, 2018, and a petition for review was filed March 13, 2018. Pursuant to NRAP 41(b)(1), remittitur will be stayed until its disposition, unless ordered otherwise by this Court. In the event of a petition for a writ of certiorari to the Supreme Court of the United States, remittitur will be stayed pending a final disposition by that Court. NRAP 41(b)(3)(B).

II. ARGUMENT

A. Under the New Rule Announced in Hurst, Juries in Nevada Must Determine Beyond a Reasonable Doubt Whether Mitigating Evidence Outweighs Aggravating Factors

The State first contends that this Court should read Hurst narrowly to address only the question already decided in Ring: whether the Sixth Amendment requires that a jury, not a judge, find the existence of aggravating factors. Ans. Br. at 12–25, 29–32. But this argument relies on the State and this Court's incorrect contention that Hurst merely is an application of Ring. Id. at 3, 6, 9, 13, 23–27; see also Jeremias, 412 P.3d at 53.

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

fact necessary to impose a sentence of death."); id. at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"). Thus, in "relatively unique" states, like Nevada, that require the outweighing determination to be resolved in the state's favor as a condition of death eligibility, see Hollaway, 116 Nev. at 745, 6 P.3d at 996, the outweighing determination, along with any other death-eligibility findings, must be made by the jury beyond a reasonable doubt.[3]

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[3] In rejecting this point, this Court's analysis in Jeremias relied on Ex parte Bohannon, 222 So.3d 525, 532 (Ala. 2016) cert. denied sub nom. Bohannon v. Alabama, 137 S. Ct. 831 (2017). See Jeremias, 412 P.3d at 53. This reliance was misplaced. Bohannon analyzed Hurst and concluded that it was "consistent with the Sixth Amendment" for Alabama judges to determine if aggravating circumstances outweigh mitigating circumstances. 222 So.3d at 532. Bohannon also concluded that Hurst did not invalidate the Alabama practice of juries "recommending" sentences, but leaving the final authority with the judge. Id. at 534. But in April of 2017, Alabama governor Kay Ivey signed into law a bill requiring juries, not judges, to have the final say on whether to impose the death penalty. See Kent Faulk, Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases, http://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html (Apr. 11, 2017). In addition, Alabama's former death-penalty scheme, like many states, included outweighing as part of the selection phase, not the eligibility phase. See Bohannon, 222 So.3d at 532. This Court should not rely on case law from another jurisdiction—that already has been legislatively overwritten—to overlook Hurst's unique application to Nevada.

1. The outweighing finding, because it is part of the eligibility phase in Nevada, is an "element" of a capital sentence

To support its reading of Hurst, the State and the Jeremias opinion rely on an equivocation between sentence-selection and sentence-eligibility. See Ans. Br. at 18-20; Jeremias, 412 P.3d at 53–54. For example, the State repeatedly asserts that "weighing is a moral decision that is not susceptible to proof," Ans. Br. at 19, cites an Eighth Amendment actual-innocence case that refers to weighing as "the hallmark of what the Supreme Court has referred to as the selection phase," Ans. Br. at 23, and thus concludes that weighing is a moral, selection-phase determination that cannot be found by the jury beyond a reasonable doubt. Ans. Br. at 21-23. But, under the proper Sixth Amendment analysis and well-established Nevada precedent, this false equivalency fails because weighing is part of the eligibility phase.

a. Nevada statutes and this Court's precedents make clear that the outweighing determination is part of the eligibility phase

In determining whether a fact must be submitted to a jury in accordance with the Sixth Amendment, "the relevant inquiry is one not

of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi v. United States, 530 U.S. 466, 494 (2000). And Nevada law provides a clear answer to that question: "[T]wo things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating." Hollaway, 116 Nev. at 745, 6 P.3d at 996 (emphasis added); see Lisle, 351 P.3d at 732 (describing "relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances"); Middleton v. State, 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible." (emphasis added)); Bennett, 111 Nev. at 1110, 901 P.2d at 683 ("[T]he death penalty is only a sentencing option if,

after balancing and evaluating the aggravating and mitigating circumstances, the former are found to outweigh the latter."); Ybarra v. State, 100 Nev. 167, 176, 679 P.2d 797, 802 (1984) (explaining that "death penalty may be imposed" only if "the mitigating factors outweigh the aggravating factors"); NRS 175.554(3) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." (emphasis added)); NRS 200.030(4)(a) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").[4]

Thus, according to the plain language of the statutes and decades of case law from this Court, both eligibility findings—the finding of aggravators and the outweighing determination—"expose the defendant to a greater punishment than that authorized by the jury's guilty

[4] The State in fact admits that weighing is part of the eligibility phase in Nevada, at least in part: "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." Ans. Br. at 22-23.

verdict," and are consequently "elements" of the sentence subject to the protections of the Sixth Amendment and Due Process Clause. Apprendi, 530 U.S. at 490, 494; see Hurst, 136 S. Ct. at 619, 621.

b. None of this Court's decisions should be read to change this longstanding Nevada rule

It is against this backdrop—clear statutes and decades of case law characterizing outweighing as part of the eligibility phase—that this Court decided Nunnery, Lisle, and Jeremias. But the rationale in these cases, to the extent that it's used to undermine Mr. Castillo's Hurst arguments, is flawed, and the State's reliance on these cases is misplaced.

First, this Court in Nunnery v. State concluded that outweighing is not subject to proof beyond a reasonable doubt. 127 Nev. 749, 772–75, 263 P.3d 235, 251–53 (2011). But, Nunnery did not change the principle that the outweighing determination is part of the eligibility finding. Rather, Nunnery held that the outweighing determination is not fact-finding. Id. at 775-76, 263 P.3d at 253. From this premise, Nunnery concluded that the requirements of Apprendi and Ring did not apply to the outweighing determination. Id. at 772, 263 P.3d at 250-51. Hurst overruled this conclusion by noting that outweighing, when part of the eligibility

determination, is subject to Apprendi and Ring. Compare Hurst, 136 S. Ct. at 622 (explaining that jury must find every fact rendering defendant eligible for death penalty), with Nunnery, 127 Nev. at 772, 263 P.3d at 250 ("[E]ven if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof.").

Second, the State relies on Lisle v. State to argue that this Court should reject Mr. Castillo's Hurst argument. Ans. Br. at 22-23, 31. But the State's reliance on Lisle is misplaced. In Lisle, this Court defined "actual innocence of the death penalty" in the context of a procedurally barred habeas petition. 351 P.3d at 727. This Court explained that the United States Supreme Court "has referred to the narrowing component of the capital sentencing process as the 'eligibility' phase and the individualized-consideration component as the 'selection' phase." Lisle, 351 P.3d at 731–32. So, this Court's analysis concluded, because weighing aggravating factors against mitigating evidence involves individualized

consideration, outweighing should be classified as a component of the "selection" phase for purposes of Lisle's Eighth-Amendment claim. Id.

But "narrowing" is a term of art in death penalty law, referring to a unique requirement of the Eighth Amendment: The Eighth Amendment requires that the death penalty only be imposed on "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). Thus, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

Lisle held that the outweighing step does not function as part of this Eighth Amendment narrowing process; the statutory aggravators alone are sufficient to comply with the narrowing requirement and satisfy the United States Supreme Court's Eighth Amendment

jurisprudence. See Lisle, 351 P.3d at 732 ("[W]e have focused on the same factors as the Supreme Court in evaluating whether Nevada has sufficiently narrowed the class of defendants who may be sentenced to death—the elements of the offense and the statutory aggravating circumstances."). This Court's analysis addressed only that narrowing aspect of Eighth Amendment law, not any Sixth Amendment requirements. See id. (noting that, although the outweighing "requirement limits the jury's discretion to sentence a person to death, it is not part of the narrowing aspect of the capital-sentencing process"); see also id. ("'Eligibility' is used in Sawyer as a descriptor for the aspect of the capital sentencing process in which the class of defendants who may be subject to the death penalty is narrowed.").

In many jurisdictions—which do not require outweighing as a condition of eligibility—the absence of Sixth Amendment analysis could be immaterial. See, e.g., United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) (en banc) (explaining that weighing determination in federal system "is not a finding of fact in support of a particular sentence," but rather "is a determination of the sentence itself"). If a criminal defendant

is already death-eligible by the time the jury reaches the outweighing question, then it may be that no Sixth Amendment issues attach to the outweighing question. See id.

The distinction between analyses under the Eighth Amendment and Sixth Amendment is relevant here, however. Under the Eighth Amendment, courts must examine whether the state has "sufficiently narrowed the class of defendants who may be sentenced to death." Lisle, 351 P.3d at 732; see McCleskey v. Kemp, 481 U.S. 279, 303 (1987). But, under the Sixth Amendment, the narrowing aspect of the sentencing determination is irrelevant; what matters is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Apprendi, 530 U.S. at 494; see Alleyne v. United States, 570 U.S. 99, 114 (2013) ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime.").

As this Court in Lisle has continued to recognize, the determination that mitigating circumstances do not outweigh aggravating factors is necessary to increase the statutory maximum from life without parole to death. See Lisle, 351 P.3d at 732 (acknowledging that there is "a

relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances"); see also Burnside v. State, 131 Nev. __, 352 P.3d 627, 646 (2015) (in decision issued same day as Lisle, reasoning that defendant "remains death eligible" because "the felony aggravating circumstance based on robbery is valid and the jury found no mitigating circumstances" (emphasis added)); Rippo v. State, 132 Nev. __, 368 P.3d 729, 753 (2016) (noting distinction between "weighing the aggravating and mitigating circumstances" and "choosing between life and death"), reh'g denied (May 19, 2016), cert. granted on other grounds, judgment vacated sub nom. Rippo v. Baker, 137 S. Ct. 905 (2017).[5] Therefore, the

[5] This Court in Lisle gave two additional reasons for distinguishing the outweighing portion of the eligibility phase from the finding of aggravators: "[T]he mitigating circumstances are not statutorily limited to an obvious class of relevant evidence, and the weighing determination itself is a moral determination, not an objective determination of facts." 351 P.3d at 733. But neither of these considerations is a reason to distinguish the two findings here. Although the United States Supreme Court has observed that "sensible meaning" can be "given to the term 'innocent of the death penalty'" only by confining the possible evidence, Sawyer v. Whitley, 505 U.S. 333, 345 (1992), that is not a consideration for Sixth Amendment purposes. And, for the reasons discussed throughout this section, any distinction between "moral" determinations

outweighing determination is an element of a capital sentence that must be submitted to a jury. See Hurst, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

Third, the Jeremias opinion further muddles the distinction between Sixth Amendment and Eighth Amendment jurisprudence: Jeremias conflates Lisle's Eighth Amendment analysis—whether weighing narrows the class of people subjected to the death penalty—with the Sixth Amendment analysis required in light of Hurst—whether weighing is necessary to subject the defendant to greater punishment than a guilty verdict alone. Instead of recognizing the fundamentally different nature of these Amendments, Jeremias assumes that if a weighing instruction narrows the class of defendants who may be sentenced to death in line with the Eighth Amendment, then it necessarily meets the Sixth Amendment's requirement that a jury decide all facts rendering a defendant death eligible. But these are two different

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and "factual" determinations is irrelevant so long as the determination increases a potential penalty beyond the statutory maximum.

inquiries, and Nevada's death-penalty scheme must satisfy both; relying on one to justify the other is circular.

In addition, the Jeremias decision incorrectly concludes that Nunnery is unaffected by Hurst. In Jeremias, the appellant argued that Hurst effectively overruled Nunnery because Hurst required every factual finding required for death eligibility, including weighing, to be proven beyond a reasonable doubt. 412 P.3d at 53–54. This Court disagreed, reasoning that under Kansas v. Carr, 136 S. Ct. 633, 642 (2016), the weighing determination presented "inherently a moral question which could not be reduced to a cold, hard factual determination," and thus similar language in Nunnery remained good law. Id.

But Kansas v. Carr, 136 S. Ct. 633 (2016), like Lisle, is an Eighth Amendment case and Jeremias was wrong to rely on it to justify continued allegiance to Nunnery. Carr is not on point because it considered an Eighth Amendment challenge to a jury instruction that failed to inform jurors that mitigating circumstances did not need to be proven beyond a reasonable doubt, not a Sixth Amendment challenge to

a weighing instruction. Id. at 642–44. Moreover, Carr's dicta—that it may not be possible to apply a standard of proof to a selection-phase determination—ignored what Kansas's own statutes require: an outweighing determination that must be proved beyond a reasonable doubt by the prosecutor. See State v. Robinson, 303 Kan. 11, 329-30, 363 P.3d 875, 1079-80 (2015) ("The Kansas death sentencing scheme requires that the jury make two findings beyond a reasonable doubt in arriving at a death sentence . . . . 'the existence of such aggravating circumstance is not outweighed by any mitigating circumstances found to exist.'") overruled on other grounds by State v. Cheever, 306 Kan. 760, 402 P.3d 1126 (2017); see also Carr, 136 S. Ct. at 642 (prefacing dicta by recognizing that Court was approaching issue "in the abstract, and without reference to our capital-sentencing case law").

Finally, this Court in Jeremias used Eighth Amendment reasoning from Lisle to conclude that weighing is "more accurately described" as part of the death-selection phase, and thus not subject to a beyond-a-reasonable-doubt burden of proof. Id. at *9. However, even if this Court interprets Jeremias to overturn decades of case law characterizing

outweighing as part of the eligibility phase, this Court should decline to apply that new rule to Mr. Castillo, who was sentenced in 1996. See Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) ("The Supreme Court has explained that '[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.'" (alteration in original) (quoting Bouie v. Columbia, 378 U.S. 347, 354 (1954)).

c. Mr. Castillo's case is distinguishable from the cases relied on by the State

It is Nevada's "relatively unique" definition of "eligibility," Lisle, 351 P.3d at 732, that distinguishes Mr. Castillo's case from the cases the State cites to justify categorizing weighing as a selection-phase determination. Many jurisdictions require, as the sole prerequisite to death eligibility, that the jury find a statutory aggravating factor. See, e.g., Gabrion, 719 F.3d at 533 ("Gabrion was already 'death eligible' once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were present."); People v. Jones, 398 P.3d 529,

553 (Cal. 2017) (concluding that defendant was death eligible after jury found him guilty of murders and found one special circumstance); State v. Mason, 2016 WL 7626193, at *10 (Ohio Ct. App. Dec. 27, 2016) (explaining that in Ohio the jury "determines beyond a reasonable doubt the existence of an aggravating circumstance—the feature that subjects a defendant to the possibility of death as a sentence"), appeal allowed, 77 N.E.3d 987 (Ohio 2017). To the extent that weighing is required by statute, courts in these jurisdictions have made clear that it is a part of the determination of death worthiness—whether the sentencer should actually impose a death sentence, weighing all of the evidence, including statutory aggravating factors and mitigating circumstances. See, e.g., Gabrion, 719 F.3d at 531–34; People v. Ballard, 794 N.E.2d 788, 820–21 (Ill. 2002) (explaining that weighing in Illinois "bears a marked resemblance to the balancing of factors in which trial courts traditionally engage in determining what sentence to impose"), as modified on denial of reh'g (Dec. 2, 2002); State v. Fry, 126 P.3d 516, 534–36 (N.M. 2005) (describing weighing as process "designed to assist the jury in deciding

which sentence is proper, not which sentence is available"); State v. Belton, 74 N.E.3d 319, 337 (Ohio 2016) (noting that weighing amounts to judgment about "what penalty to impose upon a defendant who is already death-penalty eligible"), reconsideration denied, 63 N.E.3d 158, and cert. denied, 137 S. Ct. 2296 (2017). Thus, the weighing determination in those states "is not a finding of fact in support of a particular sentence," but rather "is a determination of the sentence itself." Gabrion, 719 F.3d at 533.

In contrast, courts in jurisdictions with a three-step system like Nevada's have concluded that the weighing determination—the second step—is an element of the offense. For example, the Florida Supreme Court, on remand from Hurst, concluded that the Hurst decision applied not just to the finding of an aggravating factor, but also to "the finding that the aggravating factors outweigh the mitigating circumstances"; both, in other words, were "critical findings" subject to the constitutional protections outlined in the United States Supreme Court's Hurst decision. Hurst v. State, 202 So.3d 40, 44 (Fla. 2016). Similarly, the highest courts in Colorado and Missouri read the Apprendi line of cases

as applying to the outweighing determination, which, in those states, is an eligibility determination that precedes the final, discretionary penalty selection. See Woldt v. People, 64 P.3d 256, 266–67 (Colo. 2003) (en banc); State v. Whitfield, 107 S.W.3d 253, 259–61 (Mo. 2003) (en banc).

In this respect, the second step of Nevada's death-penalty scheme is not merely a "moral judgment," as asserted by the State, Ans. Br. at 18–20, 32, but is instead a factual determination based on a limited set of facts, see Hollaway, 116 Nev. at 746, 6 P.3d at 997 ("'Other matter' evidence is not admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances."); Middleton, 114 Nev. at 1117 & n.9, 968 P.2d at 315 & n.9 (explaining that other-matter evidence may not "be used to determine death eligibility itself"); Gallego v. State, 101 Nev. 782, 791, 711 P.2d 856, 863 (1985) ("If the death penalty option survives the balance of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to the sentence." (citing NRS 175.552)). As Mr. Castillo pointed out in his opening brief, Op. Br. at 42 n. 5, several states already require juries to

make this determination beyond a reasonable doubt. See, e.g., Rauf v. State, 145 A.3d 430, 434 (Del. 2016); State v. Rizzo, 833 A.2d 363, 410 (Conn. 2003); Ark. Code Ann. § 5-4-603(a)(2); Ohio Rev. Code Ann. § 2929.03(D)(1); Tenn. Code Ann. § 39-13-204(g)(1)(B); Utah Code Ann. § 76-3-207(5)(b).

Indeed, the determination of facts that juries must find beyond a reasonable doubt often involves just the kind of subjectivity as is involved in Nevada's weighing determination. For example, in United States v. Gaudin the United States Supreme Court rejected the government's argument that a judge could find an element of a crime—materiality—because it involved a mixed question of law and fact. 515 U.S. 506, 511–15 (1995) (explaining that inquiries involving "delicate assessments of the inferences a reasonable decisionmaker would draw from a given set of facts and the significance of those inferences to him is peculiarly one for the trier of fact" (citation and internal quotation marks, ellipses, and brackets omitted); see Neder v. United States, 527 U.S. 1, 8, 25 (1999). And several common statutory aggravators also involve fundamentally subjective concepts: whether a homicide was committed "in an especially

heinous, cruel, or deprived manner," Ariz. Rev. Stat. § 13-751(F)(6); whether a "defendant exhibited utter disregard for human life," Idaho Code § 19-2515(9)(f); and whether "[t]he offense was outrageously or wantonly vile, horrible, or inhuman," S.D. Codified Laws § 23A-27A-1(6). In noncapital schemes, too, legislatures and courts routinely require findings from juries concerning, for example: a defendant's "departure from fundamental honesty, moral uprightness, or fair play and candid business dealings," United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (emphasis omitted) (quoting jury instructions); a work's "literary, artistic, political, or scientific value," Hamling v. United States, 418 U.S. 87, 102 (1973); and whether a course of action involved a "gross deviation from the standard of care," Model Penal Code § 2.02(2)(d).

Regardless of a jury's ability to make outweighing determinations beyond a reasonable doubt, it is the third and final step in Nevada, not the penultimate outweighing step, that more closely matches what federal courts have classified as a "moral" determination. During that step, juries in Nevada consider all of the evidence, along with abstract concepts like "mercy," see Hollaway, 116 Nev. at 746–47, 6 P.3d at 996–

97; Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 285–86 (1996), to reach a determination whether the death sentence should be imposed. Compare Middleton, 114 Nev. at 1117, 968 P.2d at 315 ("Even if the jury finds that any mitigators do not outweigh the aggravators, a death sentence is not automatic, and the jury must decide in light of all the relevant evidence whether it considers death the appropriate penalty."), with Gabrion, 719 F.3d at 533 ("What § 3593(e) requires is a determination of the sentence itself, within a range for which the defendant is already eligible."), United States v. Mitchell, 502 F.3d 931, 993 (9th Cir. 2007) (explaining that purpose of weighing determination in federal system is for sentencer "to 'consider' the factors already found and to make an individualized judgment whether a death sentence is justified"), and 18 U.S.C. § 3593(e) (instructing jury during selection phase to consider whether the evidence "justif[ies] a sentence of death"). See also Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (describing capital-sentencing scheme that allows consideration of "mercy" during weighing process).

Finally, the State relies on Kansas v. Marsh, 548 U.S. 163, 175 (2006), to argue that legislatures have broad discretion to dictate how to structure capital-sentencing schemes, and can therefore choose to "exempt[] moral judgment from the beyond a reasonable doubt standard." Ans. Br. at 32.[6] The State is correct that jurisdictions generally can choose to structure death-penalty proceedings as they see fit. See Marsh, 548 U.S. at 175; Franklin v. Lynaugh, 487 U.S. 164, 179 (1988); see also Lisle, 351 P.3d at 733. But once a state has decided on a capital-sentencing scheme that includes an outweighing determination as part of the eligibility findings, the state's discretion becomes constitutionally limited; that finding must be made by a jury beyond a reasonable doubt.

[6] Marsh simply reaffirmed that a state may (as Nevada does) require mitigating factors to outweigh aggravating factors in the weighing determination. But Marsh did not hold or suggest that (or even speak to whether) a state may use a standard of proof for the weighing determination less than beyond a reasonable doubt. See Marsh, 548 U.S. at 164 (noting that under the Kansas death penalty scheme, "[a] life sentence must be imposed if the State fails to demonstrate the existence of an aggravating circumstance beyond a reasonable doubt, if the State cannot prove beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, or if the jury is unable to reach a unanimous decision in any respect"). Marsh thus simply reaffirms that whenever a legislature chooses to make a particular finding necessary to an enhanced sentence, the Sixth Amendment requires that the finding be made by a jury, beyond a reasonable doubt. See Apprendi, 530 U.S. at 475.

See Hurst, 136 S. Ct. at 621 (explaining that Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"); Cunningham, 549 U.S. at 292 ("Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."); Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

2. The rule announced in Hurst applies to the standard of proof, not just the identity of the fact finder

The State also argues that, because the United States Supreme Court in Hurst does not cite to In re Winship, 397 U.S. 358 (1970), or the reasonable-doubt standard, Mr. Castillo cannot rely on Hurst in arguing that, in Nevada, the reasonable-doubt standard applies to the outweighing determination. Ans. Br. at 13. The Court in Hurst was faced with the question whether a jury, as opposed to a judge,

must make the outweighing finding. See Hurst, 136 S. Ct. at 619. But the Court nonetheless began its substantive discussion by recognizing that the Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." Id. at 621.[7]

More importantly, as Mr. Castillo pointed out in his opening brief, Opening Br. at 20-21, a long line of cases, including the entire line of cases Hurst relies on, make clear that the Sixth Amendment right to a jury trial is so intertwined with the due process right to findings beyond a reasonable doubt that the two cannot be separated. See Alleyne, 570 U.S. at 104 ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt."); Ring, 536 U.S. at 600 (alteration in original)

[7] Jeremias does not address the intertwined nature of these rights, instead concluding that weighing is not an element of capital eligibility. 412 P.3d 43 at 53–54. As explained in more detail in § II(A)(1) above, that holding is contrary to decades of precedent and is erroneous.

("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (citation and internal quotation marks omitted)); Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" (alteration in original) (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252–53 (1993) (Stevens, J., concurring); Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury

verdict are interrelated."); Apprendi, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens").

The Delaware Supreme Court correctly recognized the intertwined nature of the two rights. See Rauf, 145 A.3d at 434 (concluding that Hurst requires the outweighing determination to be made beyond a reasonable doubt and that the absence of such a standard in Delaware's death-penalty statute is unconstitutional); Rauf, 145 A.3d at 481–82 (majority concurring opinion of Strine, C.J.) ("If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed. Put simply, the Sixth Amendment right to a jury includes a right not to be executed unless a jury

concludes unanimously that it has no reasonable doubt that is the appropriate sentence.").

But the cases the State relies on, for the most part, do not address or even attempt to distinguish this precedent.[8] This may be because in several of the cases questions concerning the standard of proof were irrelevant: because the weighing determination in those jurisdictions does not increase the maximum sentence—in contrast to Nevada's scheme—it is not subject to either the Sixth Amendment jury right or the due process right to findings beyond a reasonable doubt. See Ex parte Bohannon, 222 So. 3d 525, 532 (Ala. 2016) ("[B]ecause in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's

[8] The only case cited by the State that addresses the intertwined nature of the two rights actually supports Mr. Castillo's argument. See Ans. Br. at 16-17. In Sonner v. Filson, the federal district court notes that, "as the 'functional equivalent of an element,' the existence of aggravating circumstances must be proved beyond a reasonable doubt." No. 2:00-cv-01101-KJD-CWH, 2017 WL 3741975, at *20 (D. Nev. Aug. 29, 2017) (citing Alleyne, 133 S. Ct. at 2156, for proposition that Sixth Amendment and Due Process Clause require jury findings beyond reasonable doubt).

capital-sentencing scheme does not violate the Sixth Amendment."), cert. denied sub nom. Bohannon v. Alabama, 137 S. Ct. 831 (2017); Jones, 398 P.3d at 553 (explaining that defendant was death eligible after jury found him guilty of murders and found one special circumstance); Mason, 2016 WL 7626193, at *10 ("The trial court in this case ignored the most important feature that renders Ohio's death-penalty statute constitutional under the Sixth Amendment through Apprendi, Ring, and Hurst—that the jury, not the judge, determines beyond a reasonable doubt the existence of an aggravating circumstance—the feature that subjects a defendant to the possibility of death as a sentence."); Rayford v. State, 125 S.W.3d 521, 533 (Tex. Crim. App. 2003) ("[W]hen the State is seeking the death penalty, the prescribed statutory maximum is death. It is not an 'enhancement' of the prescribed maximum sentence of life; it is an alternative available sentence.").

B. Hurst Establishes that Appellate Reweighing in Nevada Violates the Due Process Clause and Sixth Amendment

The State also challenges Mr. Castillo's claim that appellate reweighing no longer is valid. Ans. Br. at 29–38. But to support its

argument, the State relies on dozens of pre-Hurst cases. Id. at 32–38. None of these cases was decided with the benefit of the United States Supreme Court's Hurst analysis. In light of the Hurst decision, there can no longer be any question that all eligibility findings—including the outweighing determination in states like Nevada—are equivalent to elements of capital eligibility and must be found by the jury beyond a reasonable doubt. See Hurst, 136 S. Ct. at 620–22.

In addition, the State has conflated Mr. Castillo's argument concerning appellate reweighing with arguments against harmless error review. Ans. Br. at 33–36. Several of the cases the State cites explicitly apply only the latter. See Billups v. State, 72 So. 3d 122, 134–35 (Ala. Crim. App. 2010); State v. Hausner, 280 P.3d 604, 628 (Ariz. 2012); People v. Mungia, 189 P.3d 880, 907 (Cal. 2008); State v. Abdullah, 348 P.3d 1, 85–86 (Idaho 2015); Gillett v. State, 148 So. 3d 260, 268–69 (Miss. 2014); State v. Sandoval, 788 N.W.2d 172, 215 (Neb. 2010); see also Jennings v. McDonough, 490 F.3d 1230, 1249–51 (11th Cir. 2007) (on habeas review noting that state court had declined invitation from Clemons v. Mississippi, 494 U.S. 738, 741 (1990), to reweigh aggravating

factors and mitigating evidence); Allen v. Lee, 366 F.3d 319, 334–35 (4th Cir. 2004) (en banc) (Traxler, J., concurring in part) (same). Harmless error review not affected by Hurst in the same way as appellate reweighing, and it imposes a heavy burden on the State, see Chapman v. California, 386 U.S. 18, 22–24 (1967); Neder, 527 U.S. at 19—a burden that the State since Clemons, 494 U.S. at 741, has been able to avoid.

The cases relied on by the State that do address appellate reweighing also are distinguishable: all occurred in jurisdictions that require only the finding of at least one aggravating factor for death eligibility. See Gabrion, 719 F.3d at 531–32; Lambert v. State, 825 N.E.2d 1261, 1263 (Ind. 2005); Mason, 2016 WL 7626193, at *10; Torres v. State, 58 P.3d 214, 216 (Okla. 2002); State v. Berget, 826 N.W.2d 1, 19–20 (S.D. 2013); see also Bohannon, 222 So. 3d at 532; State v. Canez, 74 P.3d 932, 934 (Ariz. 2003); Jones, 398 P.3d at 553; Bennett v. State, 933 So. 2d 930, 955 (Miss. 2006); State v. Leary, 472 S.E.2d 753, 759 (N.C. 1996); State v. Gales, 658 N.W.2d 604, 626 (Neb. 2003); Idaho Code Ann. § 19-2515(3)(b); Tenn. Code Ann. § 39-13-204(i). Consequently, any weighing that occurs in those states is part of the selection phase. This

distinction is critical: even if appellate courts can review eligibility findings for harmless error, the courts cannot make those findings in the first instance. See Hurst, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); Neder, 527 U.S. at 19 (explaining that court reviewing for harmless error does not "become in effect a second jury" (citation and internal quotation marks omitted)); Torres, 58 P.3d at 216 ("[T]his 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.").

In its Answering Brief, the State does not analyze Jeremias's application to this argument, likely because it was not an issue raised on direct appeal in that case. Consequently, Jeremias does not address the propriety of appellate reweighing. However, to the extent that Jeremias concluded that weighing is not an element of capital eligibility, Mr. Castillo maintains his arguments, see § II(A)(1) above, that it was

wrongly decided. Moreover, Jeremias's characterization of weighing compounds the contradiction this Court explicitly declined to resolve in Nunnery: how can an appellate court say, with any certainty, that all jurors would have reached the same moral conclusion in the absence of an invalid aggravator? See Nunnery, 127 Nev. at 776 n.13. In light of Hurst, this Court should take the opportunity to resolve this contradiction now and overrule Nunnery.

C. Hurst Applies Retroactively in Nevada

The State argues that Hurst does not apply retroactively to cases on collateral review. Ans. Br. at 26–29. But in support of its argument, the State improperly relies on the federal retroactivity standard. Id. The standard in Nevada is more relaxed and "more liberally defines the two exceptions to the usual rule of nonretroactivity." Clem v. State, 119 Nev. 615, 628, 81 P.3d 521, 530 (2003); see Colwell v. State, 118 Nev. 807, 818–19, 59 P.3d 463, 471 (2002). Specifically, a new rule of constitutional law applies retroactively in Nevada if either of two exceptions is met: "(1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain

defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." Colwell, 118 Nev. at 820, 59 P.3d at 472; see Clem, 119 Nev. at 628, 81 P.3d at 530–31. New procedural rules do not have to be of "watershed" significance to apply retroactively. See Colwell, 59 P.3d at 472.[9]

For this reason, the cases cited by the State are irrelevant; all rely on the stricter federal standard. See Schriro v. Summerlin, 542 U.S. 348, 351–58 (2004); Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), cert. denied sub nom. Lambrix v. Jones, 138 S. Ct. 217 (2017); Lambrix v. Sec'y, Florida Dep't of Corr., 872 F.3d 1170, 1182 (11th Cir. 2017); In re Jones, 847 F.3d 1293, 1294–95 (10th Cir. 2017); In re Coley, 871 F.3d 455, 457 (6th Cir. 2017); Reeves v. State, 226 So. 3d 711, 757 (Ala. Crim. App. 2016), reh'g denied (Oct. 24, 2016), cert. denied (Jan. 20, 2017), and cert. denied, Reeves v. Alabama, 138 S. Ct. 22 (2017); see also Asay v. State, 210 So. 3d 1, 15 (Fla. 2016) (concluding

[9] By making this argument, Mr. Castillo does not imply that he could not satisfy the federal standard for retroactivity as well. See Powell v. State, 153 A.3d 69, 75–76 (Del. 2016).

under state retroactivity standards that Hurst applies retroactively to cases not final until after United States Supreme Court issued decision in Ring), reh'g denied, No. SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017), and cert. denied, Asay v. Florida, 138 S. Ct. 41 (2017).

Using the correct standard, the new rule announced in Hurst applies retroactively both as a procedural and as a substantive rule. See Powell v. Delaware, 153 A.3d 69, 74 (Del. 2016) ("The burden of proof is one of those rules that has both procedural and substantive ramifications."). First, just as the burden-of-proof rules announced in Winship, 397 U.S. 358, and Mullaney v. Wilbur, 421 U.S. 684 (1975), apply retroactively, see Ivan V. v. City of New York, 407 U.S. 203, 205 (1972); Hankerson v. North Carolina, 432 U.S. 233, 240 (1977), the rule announced in Hurst applies retroactively as a procedural rule because it "reduce[s] the risk of factual error in a criminal proceeding." Batin v. State, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) (citation and internal quotation marks omitted); see Colwell, 118 Nev. at 820, 59 P.3d at 472 (explaining that new rule should be applied retroactively if "it establishes a procedure without which the likelihood of an accurate [verdict] is

seriously diminished."); see also Winship, 397 U.S. at 363 (reasoning that the beyond-a-reasonable-doubt standard "is a prime instrument for reducing the risk of convictions based on error"); United States v. Doyle, 130 F.3d 523, 538–39 (2d Cir. 1997) ("As the Supreme Court noted in Winship, the reasonable doubt standard is vital in part because it ensures against unjust convictions and reduces the risk of factual error."); United States v. Gabriner, 571 F.2d 48, 50 (1st Cir. 1978) (explaining that the reasonable-doubt standard "exists to reduce the risk of convicting defendants by factual error"); Powell, 153 A.3d at 75–76 (concluding that the rule announced in Hurst is "a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware" because it increases accuracy).

In addition, the extension of the beyond-a-reasonable-doubt standard to the weighing determination wholly excludes from the death penalty a category of capital defendants: those cases where the State cannot prove the outweighing finding beyond a reasonable doubt. See Colwell, 59 P.3d at 472 (defining substantive rules as rules that "establish[ ] that it is unconstitutional to . . . impose a type of punishment

on certain defendants"); see also Montgomery v. Louisiana, 136 S. Ct. 718, 732–34 (2016) (concluding that rule announced in Miller v. Louisiana, 567 U.S. 460 (2012), was substantive and applied retroactively because it had the effect of rendering "life without parole an unconstitutional penalty" for a particular class of defendants—"juvenile offenders whose crimes reflect the transient maturity of youth"); Schriro, 542 U.S. at 353 ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.").

Lastly, the State is wrong to rely on Schriro v. Summerlin, 542 U.S. 348 (2004) to rebut this argument, Ans. Br. at 27, because it is distinguishable from this case; in Schriro, the Court addressed only the retroactivity of Ring's holding, made pursuant to the Sixth Amendment right to a trial by jury, that a jury, not a judge, must find the existence of an aggravating circumstance. Id. at 353. Mr. Castillo's claim concerns not the identity of the factfinder (to make the weighing determination), but rather the burden of proof the factfinder must apply. Thus, the retroactive rule at issue here does not involve a "prototypical procedural rule" that "allocate[s] decisionmaking authority," id. at 353–58, but

instead a substantive rule and a procedural rule of watershed significance. See Powell v. State, 153 A.3d 69, 75–76 (Del. 2016) (concluding that rule announced in Hurst is a new watershed rule of criminal procedure requiring retroactive application).

D. Mr. Castillo Has Established Good Cause and Prejudice to Excuse Any Procedural Default

Finally, the State argues that Mr. Castillo's claim is procedurally defaulted under NRS 34.726(1), 34.800, and 34.810. Ans. Br. at 5–12. But the merits of Mr. Castillo's claim cannot be separated from the procedural aspects: Because Mr. Castillo filed his petition within one year of the United States Supreme Court's announcement of the new rule in Hurst, and because his claim under Hurst is meritorious, he has shown good cause and prejudice.[10]

[10] Jeremias does not change this outcome. First, Jeremias, a direct appeal case, did not engage in a post-conviction cause and prejudice analysis. Second, to the extent that Jeremias concluded that Hurst created "no new law relevant to Nevada," the Court erred for the reasons discussed in § II(A)(1), above.

1. Mr. Castillo has shown that he had good cause for the timing of his claim

In addressing good cause, the State argues that Mr. Castillo's claim "was continuously available" since the United States Supreme Court decided Ring in 2002. Ans. Br. at 24-25. But the State ignores that this Court's precedent foreclosed Mr. Castillo's argument. In Nunnery v. State, this Court held that "even if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof." 127 Nev. 749, 772, 263 P.3d 235, 250 (2011). After Hurst, this conclusion no longer is tenable. See Hurst, 136 S. Ct. at 622 (concluding that death sentence violated Sixth Amendment because court imposed sentence above maximum available "without any judge-made findings"). Mr. Castillo has consequently established good cause: "the factual or legal basis for a claim was not reasonably available" until the United States Supreme Court issued Hurst. Clem, 119 Nev. at 621, 81 P.3d at 525; see Evans v. State, 117 Nev. 609, 644, 29 P.3d 498, 521 (2001) (holding that good cause to overcome state procedural default exists when "a federal

court concludes that a determination by this court is erroneous"), overruled in part on other grounds by Lisle, 351 P.3d 733 n.5.

2. Mr. Castillo has shown prejudice

The State also contends that Mr. Castillo has not shown prejudice, but the State argues only that Mr. Castillo's argument loses on the merits. Ans. Br. at 26.[11] As shown in the previous sections, Mr. Castillo's Hurst claim is meritorious, and the rule announced in Hurst applies retroactively, entitling him to relief.

[11] The State has not responded to Mr. Castillo's argument that a fundamental miscarriage of justice would result if this Court refuses to reach the merits of his constitutional claim.

III. CONCLUSION

Castillo requests that this Court vacate his death sentence and remand his case for a new penalty hearing.

DATED this 11th day of April, 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:

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complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 11th, 2018. Electronic Service of the foregoing APPELLANT'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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