IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

WILLIAM P. CASTILLO,

Petitioner/Appellant,

vs.

WILLIAM GITTERE, et al.,

Respondent/Appellee.

Supreme Court No. 73465

District Court Case No. C133336-1

(Death Penalty Habeas Corpus Case)

PETITION FOR REHEARING

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I. INTRODUCTION

On May 30, 2019, this Court affirmed the denial of William Castillo's petition for writ of habeas corpus, rejecting both parts of Castillo's claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016): (1) an improperly low burden deprived Castillo of his right to proof beyond a reasonable doubt of every element of the offense; and (2) appellate reweighing deprived Castillo of his right to have a jury decide all facts that increased his potential sentence. In doing so, this Court continued its sharp divergence from three decades of precedent and the plain language of the Nevada statutes, insisted on adhering to inapposite case law from the United States Supreme Court, and ignored the clear meaning of recent, binding United States Supreme Court precedent. Because this Court has "overlooked, misapplied or failed to consider" state statutes and controlling decisions, NRAP 40(c)(2)(B), Castillo respectfully seeks reconsideration.

II. ARGUMENT

A. This Court's Decisions in *Castillo*, *Jeremias*, and *Lisle* Represent a Sharp Divergence from Nevada Statutes and its Own Precedent

The proper interpretation of Nevada's death-penalty scheme over the last four decades has been the subject of sharp disagreement by the members of this Court. *See Canape v. State*, 109 Nev. 864, 888, 859 P.2d 1023, 1038 (1993) (Springer, J., dissenting) ("I have become convinced that no one, including the members of this court, presently understands precisely what juries are required to do in Nevada when they are asked to decide between the death penalty and life imprisonment."). But capital defendants could at least rely on this Court's consistent enforcement of one aspect of the scheme—the requirement that juries consider death as an option only *after* concluding that mitigating evidence does not outweigh any statutory aggravating factors. Thus, as this Court held repeatedly over three decades, a capital defendant is not "death eligible" unless the outweighing determination favored the State. Starting in 2015, however—and without explicitly acknowledging the departure—this

Court began sharply diverging from the statutes and this Court's prior precedents. In addition to disregarding stare decisis without "compelling reasons for so doing," *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008); *see State v. Harte*, 124 Nev. 969, 977–78, 194 P.3d 1263, 1268 (2008) (Hardesty, J., concurring), this Court has usurped the power of the Nevada legislature by rewriting the plain language of the capital sentencing scheme. Reconsideration of this Court's decision is therefore required.

1. For more than three decades this Court's opinions were aligned with the plain language of the statutory capital-sentencing scheme.

Nevada statutes establish a capital-sentencing scheme with two preliminary steps, which are required before the jury can consider whether to impose the death penalty. The jury must (1) find at least one statutory aggravating factor and (2) determine that no mitigating circumstances outweigh that aggravating factor or factors. *See* NRS 175.554, 200.030(4)(a). Only after the jurors complete these two preliminary steps can they move to the third step, where they for the first time can consider non-statutory aggravation and other-matter

evidence relating to the individual characteristics of the defendant. *See* NRS 175.552(3); *Burnside v. State*, 131 Nev. __, 352 P.3d 627, 646 (2015); *Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82–83 (2004). These statutes work together; indeed, it makes little sense to include a third step that merely duplicates the considerations, arguments, and evidence from the second step.

For thirty-five years, opinions from this Court followed the plain language of these statutes, consistently holding that the finding of an aggravating factor and the outweighing determination are *both* prerequisites to death eligibility. In 1984, this Court explained that "the death penalty may be imposed" only if mitigating factors do not outweigh aggravating factors. *Ybarra v. State*, 100 Nev. 167, 176, 679 P.2d 797, 802 (1984); *see also Gallego v. State*, 101 Nev. 782, 790, 711 P.2d 856, 862 (1985). In two cases the following decade, this Court held that the death penalty "is only a sentencing option" if aggravating factors outweigh mitigating circumstances. *Bennett v. State*, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995); *see Williams v. State*, 113 Nev. 1008, 1024 n.8, 945 P.2d 438, 447 n.8 (1997).

Over the following twenty years, this Court continued to characterize the outweighing determination as an "eligibility" finding, required before consideration of the death penalty. *See McConnell v. State*, 121 Nev. 25, 33, 107 P.3d 1287, 1292 (2005); *see also Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011); *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001); *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); *Middleton v. State*, 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1998).

2. In 2015, this Court began departing from its precedents and the statutory sentencing scheme

In a series of three opinions over four years, *Lisle*, *Jeremias*, and, now, *Castillo*, this Court abandoned its precedents *sub silento* and departed from the plain language of the statutes, purportedly removing outweighing from the eligibility determination.

This Court began to change course in *Lisle v. State*, 131 Nev. __, 351 P.3d 725 (2015). For the first time, this Court characterized the outweighing determination in Nevada as one of selection rather than eligibility, holding that outweighing 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.* at 732. But this Court further explained that, in saying that Nevada's outweighing process was part of the "selection phase," it was referring to the definition given that phrase by the Supreme Court in *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992), which was a case interpreting Louisiana's capital sentencing scheme, not the scheme enacted by the Legislature. *Lisle*, 351 P.3d at 732–33.[1] And this Court continued to recognize, as it had for the previous thirty years, that "death-eligibility" in Nevada refers to *both* preliminary determinations—which, this Court explained, "stems from 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." *Id.* at 732; *see also Burnside,* 352 P.3d at 646 (in decision issued same day as *Lisle*, continuing to recognize three-step sentencing scheme in Nevada). Nevertheless, this holding

[1] In *Sawyer v. Whitley*, as in *Lisle*, the United States Supreme Court addressed actual innocence of the death penalty. Neither case addressed the Sixth Amendment.

provoked a strong dissent from Justices Cherry and Saitta, accusing the majority of engaging in "semantic gymnastics in order to conclude that Nevada's death penalty scheme is something other than what the statutes plainly make it." *Lisle*, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting). The dissenting opinion, unlike the majority, recognizes the key difference between Nevada's statutory sentencing scheme and the scheme at issue in *Sawyer*: The plain language of Nevada's scheme requires outweighing as a precondition to reaching the ultimate sentencing decision. *Id.* Ignoring this difference, the dissent concludes, transforms Nevada's scheme into something different than the statutes require. *Id.*

In *Jeremias v. State*, this Court doubled down on its statement from *Lisle*, purportedly removing completely from the eligibility determination. 134 Nev. ___, 412 P.3d 43, 54, *reh'g denied* (Apr. 27, 2018), *cert. denied*, 139 S. Ct. 415 (2018). "[A] defendant is death-eligible," this Court newly held, "so long as the jury finds the elements of first-degree murder and the existence of one or more aggravating circumstances." *Id.* But this Court still qualified its holding, adding that

its use of "death-eligibility" came from Eighth Amendment narrowing case law, not Sixth Amendment case law. *See id.* (explaining that the use of "death-eligible" is "as the term is used for the purposes of the narrowing requirement amenable to the beyond-a-reasonable-doubt standard").

Finally, in this case, this Court completed what it started in *Lisle* and *Jeremias*, reading the outweighing step out of existence. This Court insisted that "the weighing of aggravating and mitigating circumstances is not part of death-eligibility under [Nevada's] statutory scheme." *Castillo v. State*, 135 Nev. ___, 442 P.3d 558, 561 (2019). In support, this Court cited only to *Jeremias* and *Lisle*—ignoring this Court's previous cases holding the exact opposite. *Id.* And, unlike *Jeremias* and *Lisle*, this Court did not qualify its use of the term "death-eligible" to refer to the definition of the term from Eighth Amendment cases.

Thus, in the past four years, this Court has disrupted decades of precedent in a way that fundamentally misinterprets what Nevada juries are supposed to do when undertaking one of the most crucial and

grave determinations any jury could make. And this disruption was completely unnecessary, done not to rectify confusion in the statutes but to reject constitutional claims that could have been resolved without rejiggering the capital sentencing scheme. *See Lisle*, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting); *see also Castillo*, 442 P.3d at 561 n.1 (noting "apparent confusion" caused by recent changes in this Court's precedent).[2]

3. This Court's departure from the plain language of statutes and prior precedent has far-reaching—but unacknowledged—implications

This Court in *Castillo*, building on *Lisle* and *Jeremias*, reads a crucial—and statutorily mandated—step of death eligibility out of existence. In Nevada, "[t]he jury may impose a sentence of death *only if*

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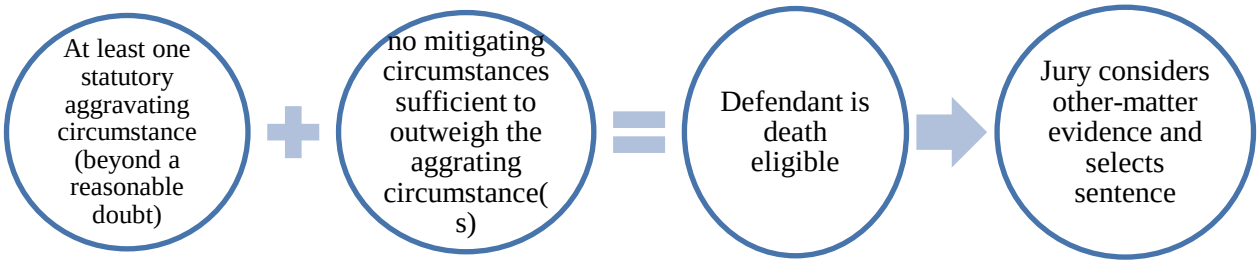
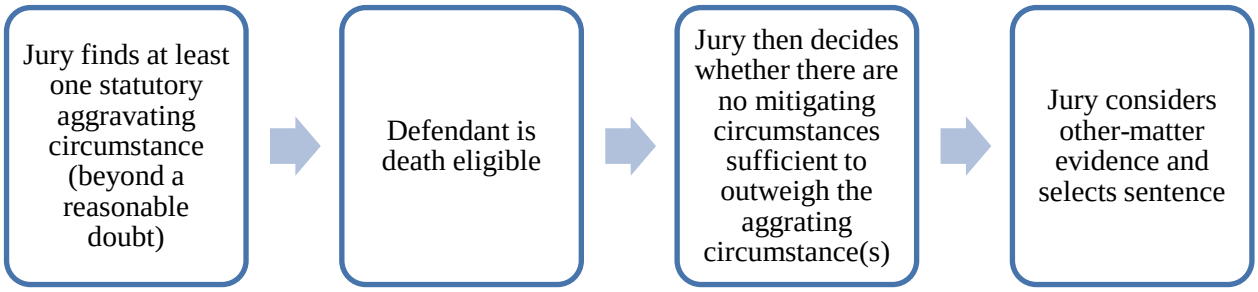
[2] This Court rejected "Castillo's argument that he should be permitted to take advantage of the apparent confusion caused by our lack of precision when using the term 'eligibility.'" *Castillo*, 442 P.3d at 561 n.1. But this just shows why this Court should not be reinterpreting the capital sentencing scheme when this case concerns the application of the Sixth Amendment.

In *Lisle*, the parties did not have an opportunity to brief the issues above. And interpretation of the capital sentencing scheme was not necessary there—or in *Jeremias* or Castillo's case. It is for this very reason that this Court should not have been engaging in radical reconstruction of the statutory scheme in cases where it was unnecessary to do so.

it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3) (emphasis added). Thus, the statute clearly requires two things before a defendant becomes death-eligible. The jury must find at least one aggravator and make an outweighing determination:



This Court in *Castillo*, however, removed the second step from the eligibility determination, insisting that outweighing functioned to "guide[] jurors in exercising their discretion to impose a sentence to which the defendant is already exposed." *See Castillo*, 442 P.3d at 561. Thus, *Castillo* reshapes Nevada law to purportedly mean the following:



This rewritten scheme might exist in similar form in "two-step" states, which require the jury to determine only whether at least one aggravating factor exists and whether mitigating evidence outweighs that aggravating factor or factors.[3] But Nevada's scheme is different—indeed, it is "relatively unique." *Lisle*, 351 P.3d at 732. The uniqueness comes from Nevada's third step, *after* outweighing, where the jury makes the final determination whether death is the appropriate penalty. It is only in this third step that jurors can consider "other-matter evidence," including evidence of victim impact. *See* NRS

[3] For example, the California death-penalty scheme renders a defendant death eligible once the jury finds at least one statutory aggravating factor, then requires the jury to weigh mitigating evidence against aggravating circumstances in order to select the penalty. Cal. Penal Code §§ 190.1, 190.3; *see also, e.g.*, Idaho Code § 19.2515; Ind. Code § 35-50-2-9; Kan. Stat. § 21-5401; Mont. Code § 46-18-305.

175.552(3); *Burnside*, 352 P.3d at 646; *Butler*, 120 Nev. at 895, 102 P.3d at 82–83. In other words, like other "weighing states," outweighing in Nevada is the penultimate, rather than the ultimate, step, which is followed by the sentencing determination. *See, e.g.*, *Rippo v. State*, 122 Nev. 1086, 1093, 146 P.3d 279, 283-84 (2006) ("a Nevada jury may consider 'other matter' evidence only after it has decided whether a defendant is eligible for the death penalty. The consideration of invalid factors before that point skews the eligibility decision, even if those factors would be relevant in deciding subsequently whether a death eligible defendant actually should receive a death sentence."); *Bejarano v. State*, 122 Nev. 1066, 1081 n.68, 146 P.3d 265, 275 n.68 (2006) (same).

This distinction between two-steps states and Nevada's three-step system is crucial; the three-step scheme represents the Nevada Legislature's attempt to comply with the constitutional requirement that a death sentence be narrowly applied and based on individualized consideration. *See Middleton v. State*, 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1997) (explaining that "the narrowing to death eligibility"

occurs during first two steps); *Gallego*, 101 Nev. at 790–91, 711 P.2d at 862–63 (acknowledging that finding of aggravating factors and outweighing determination are part of narrowing requirement under Eighth Amendment); *see also Brown v. Sanders*, 546 U.S. 212, 216 (2006).[4] NRS 175.554(3) and NRS 200.030(4) cover the eligibility stage, requiring the jury to find at least one aggravating factor and weigh it against mitigating evidence. And NRS 175.552(3) covers the selection stage, where the universe of available evidence for the jurors' consideration opens to include things like victim impact and previous convictions.

This Court's recent interpretation of the capital sentencing scheme fails to consider the unique role that other-matter evidence plays in the sentencing process. Taking this Court at its word, there are now two selection phases in a capital case in Nevada. But by failing to

[4] Whether the statutory scheme actually performs these constitutionally required roles is unimportant for purposes of the Sixth Amendment analysis here. The Sixth Amendment, unlike the Eighth Amendment, looks to the statutory scheme the legislature has actually enacted. *Compare Apprendi v. New Jersey*, 530 U.S. 466, 120 (2000) (Sixth Amendment), *with Brown v. Sanders*, 546 U.S. 212, 216 (2006) (Eighth Amendment).

acknowledge the existence of the third step in Nevada's sentencing procedure, this Court ignored the redundancy problem that its interpretation of the statutory scheme creates. The existence of two selection stages, one in which the jury can consider other-matter evidence and one in which it cannot, is meaningless and incomprehensible to juries. Barring that, this Court just read NRS 175.552(3) out of the statutory scheme altogether. In that case, the outweighing determination is the determination of the sentence itself, and the scheme, as rewritten by this Court, does not allow the State to introduce evidence outside of proving any statutory aggravating factors—a result that this Court obviously did not intend.

Either way, this Court has usurped the province of the Legislature to decide how Nevada's death-penalty scheme should operate. *See Lee v. State*, 116 Nev. 452, 454–55, 997 P.2d 138, 140 (2000) (refusing to broaden statute, as that "is a function of the legislature"); *Barrios-Lomeli v. State*, 114 Nev. 779, 780, 961 P.2d 750, 750–51 (1998) ("We are not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning." (quoting *Union Plaza Hotel*

v. Jackson, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985)). This Court should reconsider its decision in this case and return to its previous lines of jurisprudence that comported with the statutory scheme.

B. This Court's Erroneous Adherence to *Clemons v. Mississippi* Violates the Sixth Amendment

In footnote 2, this Court rejected Castillo's argument that reweighing aggravating circumstances against mitigating evidence on appeal, after striking an invalid aggravating factor, violated his right to a jury trial. *See Castillo*, 442 P.3d at 561. But this Court based its rejection entirely on a statement from the High Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), implying that it had no authority to "depart" from *Clemons* and quoting language from the High Court about *binding* precedent. *Castillo*, 442 P.3d at 561 n.2 ("[High Court] decisions remain *binding precedent* until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (emphasis added) (quoting *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016)). By failing to acknowledge that good reason exists for disavowing any reliance on the outdated case, this Court both

"overlooked" and "misapplied" controlling decisions. *See* NRAP 40(c)(2)(B).

First, *Clemons* does not "bind" the Court to perform appellate reweighing; *Clemons* gave state supreme courts the option to do so—or not—without running afoul of the United States Constitution. In particular, this Court may conduct harmless error analysis without running afoul of Castillo's right to a jury trial. *See Chapman v. California*, 386 U.S. 18, 21-24 (1967). *Clemons* does nothing to prevent this Court from taking that approach rather than engaging in reweighing. In fact, *Clemons* sanctions that approach. *See Clemons*, 494 U.S. at 753.

Second, even if *Clemons's* appellate-reweighing option was binding at the time it was decided, the idea that only the High Court can overrule its own precedent coexists with the doctrine that its cases can be implicitly overruled. *See Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2204 (2016) (explaining that a 2003 High Court case had "implicitly overruled" a previous case); *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (holding that more recent

High Court decisions demonstrated that other precedent had been overruled); *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (explaining that the High Court will reconsider decisions when "the theoretical underpinnings of those decisions are called into serious question"); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359 (1984) (acknowledging that a prior case was not expressly overruled, but a subsequent case "strongly implies that the foundation of the former had been seriously undermined").

Indeed, this is just what the High Court did in *Roper v. Simmons*, 543 U.S. 551 (2005). There, the Missouri Supreme Court addressed whether recent High Court decisions had called into question the Court's holding allowing the death penalty for juvenile offenders. *Id.* at 559–60. The Missouri Supreme Court decided that they had, and the Court agreed. *Id.* at 578–79. Thus, state supreme courts do not need to wait for an explicit overruling from the High Court—they are free to interpret High Court precedent and recognize when a case may no longer be good law.

Just as the High Court implicitly overruled prior authority in *Roper*, the High Court has implicitly overruled the appellate-reweighing holding in *Clemons*. The High Court grounded *Clemons*, a case from 1990, in pre-*Apprendi* case law.[5] *Clemons* permitted appellate reweighing only because the Court had generally approved judicial factfinding that increased a defendant's sentence. The Court in *Clemons* summarized the state of Sixth Amendment law at that time as "soundly reject[ing]" any requirement "that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence," even when those prerequisite findings included the finding of an aggravating factor. *Clemons*, 494 U.S. at 745–46.

As Castillo pointed out in his Opening Brief, this basis for *Clemons* was substantially undermined by *Apprendi* and *Ring*, and then eviscerated by *Hurst*, which held impermissible any judicial factfinding—including judicial determinations about the relative weight of aggravating and mitigating circumstances—that increases a potential sentence above what the jury verdict authorizes. *See Hurst*,

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[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

136 S. Ct. at 621–22; *see also State v. Kirkland*, 15 N.E.3d 818, 850–51 (Ohio 2014) (O'Neill, J., dissenting) (opining "that *Clemons* is bad law that will someday be explicitly overruled"); *Baston v. Bagley*, 420 F.3d 632, 639 n.1 (6th Cir. 2005) (Merritt, J., dissenting) ("[I]t seems very likely that *Ring* has overruled *Clemons*."). Indeed, the Court has since overruled, in whole or in part, all but one Sixth Amendment case relied on in *Clemons*. *See Clemons*, 494 U.S. at 746 (relying on *Spaziano v. Florida,* 468 U.S. 447 (1984), *overruled by Hurst*, 136 S. Ct. 616); *id.* (relying on *Hildwin v. Florida*, 490 U.S. 638 (1989), *overruled by Hurst*, 136 S. Ct. 616); *McMillan v. Pennsylvania*, 447 U.S. 79 (1986), *overruling recognized by United States v. Haymond*, No. 17-1672, 2019 WL 2605552, at *6 (2019)); *but see id.* at 745–46 (relying on *Cabana v. Bullock*, 474 U.S. 376 (1986)).

Thus, this Court should reconsider its erroneous holding that *Clemons* is binding and exercise its authority as the highest court in Nevada to correctly interpret its own death-penalty statute in light of *Hurt's* clarification on what the Sixth Amendment requires.

C. This Court's Decision in *Castillo* Is Irreconcilably Inconsistent with Binding High Court Precedent

Over the previous four years, this Court has substantially reformulated Nevada's death-penalty scheme with no acknowledgment it was doing so—and in cases where reformulation of the statutory scheme was completely unnecessary. *See Castillo*, 442 P.3d at 560 (stating incorrectly that this Court "*reiterated* in *Lisle* [ ] that a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance" (emphasis added)). *Castillo* represents the sharpest divergence yet. In addition to the problems this has created under state law, the new formulation conflicts with several lines of United States Supreme Court precedent thereby requiring reconsideration.

1. *Apprendi* and its progeny focus on effect, not form

Despite this Court's statement to the contrary, *Castillo*, 442 P.3d at 561 n.1, its decision in *Castillo* elevates form over effect to reject Castillo's arguments. The decision focuses almost entirely on the semantic differences between facts and nonfacts, and between eligibility and selection. But the High Court has consistently held that "the

relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494; *see United States v. Haymond*, No. 17-1672, 2019 WL 2605552, at *5 (U.S. June 26, 2019) (explaining that a State cannot avoid the Sixth Amendment by labeling the process "a judicial sentencing enhancement" (citation and internal quotation marks omitted)); *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) (rejecting semantic distinction between elements of crime and sentencing factors and explaining that "*Winship*[6] is concerned with substance rather than this kind of formalism").

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[6] *In re Winship*, 397 U.S. 358 (1970).

No matter what this Court calls the outweighing determination—an eligibility determination, a selection determination, a factual finding, a moral finding, or Mary Jane—the statute clearly does not allow consideration of the death penalty until outweighing comes out in the State's favor. In other words, outweighing is a necessary prerequisite to increasing the maximum potential punishment from life imprisonment to death. Thus, under *Apprendi* and its progeny, outweighing must be proved to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476, 494–95.

2. *Andres v. United States* and *Mullaney v. Wilbur* require that a jury make findings to progress cases, not to "walk back" findings it already made

In an attempt to avoid the above conflict with the *Apprendi* line of cases, this Court reformulated Nevada's capital-sentencing scheme by reversing the legal effect of the outweighing finding. This new formulation requires the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, to use the outweighing determination to "walk-back" a death-eligibility finding to a life sentence. *See Castillo*, 442 P.3d at

561. This reformulation conflicts with a second line of High Court precedent applying the Sixth Amendment and demands reconsideration.

The High Court first considered in *Andres v. United States* the interpretation of a statute that required jurors to "walk back" a sentence of death to a sentence of life. 333 U.S. 740 (1948). The federal death-penalty statute at the time, 18 U.S.C. § 567, allowed jurors to "qualify" a guilty verdict by adding "without capital punishment." *Andres*, 333 U.S. at 742 n.1 (quoting 18 U.S.C. § 567). If the jury did not qualify the guilty verdict, the death penalty was automatic. *Id.* The Court rejected a construction of the statute "whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* at 748–48. Instead, the Court explained, the jury must decide unanimously on guilt and then decide unanimously between life imprisonment and death. *Id.*

Next, in *Mullaney v. Wilbur*, the High Court considered a Maryland statute that required a defendant prove he acted "'in the heat of passion on sudden provocation' in order to reduce . . . homicide to

manslaughter," *i.e.*, to "walk back" a homicide to manslaughter by proving an affirmative defense. 421 U.S. 684, 684–85 (1975). The Court addressed two aspects of the Maryland statute: (1) the defendant had the burden of proving heat of passion, and (2) the statute did not require proof beyond a reasonable doubt. *Id.* at 696–701. Because the absence of heat of passion significantly increased the defendant's potential sentence the Court concluded that both aspects of the Maryland statute violated due process. *Id.* "This is an intolerable result," the Court explained, "in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703–04.

The Court also rejected an argument that the burden should remain with the defendant "because of the difficulties in negating an argument that the homicide was committed in the heat of passion." *Id.* at 701. "No doubt this is often a heavy burden," the Court acknowledged, but "[t]he same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal

trial." *Id.* The Constitution requires the State prove the absence of heat of passion beyond a reasonable doubt, as "this is the traditional burden which our system of criminal justice deems essential." *Id.*

In combination, *Andres* and *Mullaney* show that the construction of Nevada's death-penalty statutes given by this Court violates Castillo's constitutional right to a jury verdict. The outweighing determination is a prerequisite to the jury considering a death sentence. *See Lisle*, 351 P.3d at 732. And it violates the Due Process Clause and the Eighth Amendment to make this requirement an afterthought for the jury, used only to lessen a death sentence to life imprisonment. *See Mullaney*, 421 U.S. at 703–04.[7] Thus, this Court should reconsider its erroneous holding that Nevada defendants become death-eligible at the first stage in the sentencing determination, then can become non-death-eligible at the second stage.

[7] Allowing the jurors, as an act of mercy, to walk back a death sentence to life imprisonment also lessens their sense of personal responsibility, in violation of the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

III. CONCLUSION

"I have become convinced that no one, including the members of this court, presently understands precisely what juries are required to do in Nevada when they are asked to decide between the death penalty and life imprisonment." *Canape*, 109 Nev. at 888, 859 P.2d at 1038 (Springer, J., dissenting). Justice Springer's words from 1993 were both true at the time and prophetic—if anything, the certainty in Nevada's capital sentencing scheme has decreased since he penned those words.

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The *Castillo* opinion represents a further departure from certainty, and a further departure from the death-penalty statute itself. Consequently, Castillo asks this Court to grant his petition for rehearing.

DATED this 12th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the spacing and 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:

   It has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 font Century.

2. I further certify that this petition for rehearing complies with the type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,650 words.

   DATED this 12th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of July, 2019, electronic service of the foregoing **PETITION FOR REHEARING** shall be made in accordance with the Master Service List as follows:

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