**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Electronically Filed
May 02 2022 03:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

KEITH JUNIOR BARLOW,

Appellant,

v.

THE STATE OF NEVADA

Respondent.

CASE NO: 77055

**PETITION FOR REHEARING**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN AFSHAR, and submits this Petition for Rehearing pursuant to Rule 40 of the Nevada Rules of Appellate Procedure (NRAP). This pleading is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 2nd day of May 2022.

Respectfully submitted,

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BY */s/ John T. Afshar*
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## MEMORANDUM
## POINTS AND AUTHORITIES

This Court's published opinion reversed Barlow's penalty phase based on cumulative error, aggregating three individually harmless errors. The Court held that Barlow's counsel was prevented from arguing that a single juror, during the eligibility phase, could prevent death eligibility because the determination that mitigating circumstances outweighed aggravating circumstances does not have to be unanimous. Barlow v. State 138 Nev. Adv. Op. 25 (2022) at 4-9. However, because the jury was correctly instructed, and because no juror found that mitigating circumstances outweighed the aggravating circumstances, the error was harmless. Id. at 8-9. The Court also held that the State committed prosecutorial misconduct because the prosecutor's argument "implicitly argued that Barlow deserved the death penalty because he killed two people…" Id. at 9-10. These two errors, the Court held, in addition to a third invalid aggravator, resulted in cumulative error sufficient to require a new penalty hearing. Id. at 16-17.

Pursuant to Rule 40(c)(2) of the Nevada Rules of Appellate Procedure (NRAP), this Court considers rehearing when it has overlooked or misapprehended a material fact or question of law. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 608-610, 245 P.3d 1182, 1184 (Nev. 2010). Accord, McConnell v. State, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005). Additionally, rehearing is warranted

where the Court has overlooked, misapplied, or failed to consider directly controlling legal authority. Bahena, 126 Nev. at 608, 245 P.3d at 1184.

### A. The Court Overlooked and Misapprehended a Question of Law in Holding That a Single Juror in The Selection Phase Does Not Hang A Jury

The State argued that the district court did not err by precluding Barlow's argument during closing. Respondent's Answering Brief filed June 16, 2020, at 112-117. This Court misapplied NRS 175.554 because it conflates "the jury" with "a juror." The Court initially correctly recited that "The jury is charged to first determine unanimously if the State has proved at least one aggravating circumstance beyond a reasonable doubt." Barlow, 138 Nev. Adv. Op. at 6. The Court then stated that "Next, each juror must individually determine whether any mitigating circumstances exist." Id. NRS 175.554, however, states that "The jury shall determine … (b) Whether a mitigating circumstance or circumstances are found to exist." The Court appears to have transitioned from NRS 175.554's comment that "[t]he jury" must determine the existence of mitigating circumstances to "each juror" making that determination by relying on Jimenez v. State, which held that a jury need not unanimously agree that a mitigating circumstance exists. 112 Nev. 610, 624-25 (1996). However, Jimenez also held that:

> "Unanimity is required only in the verdict concerning the presence of aggravating circumstances and the fact that the mitigating

> circumstances, whatever they are, are not sufficient to outweigh the aggravating circumstances. We therefore conclude that there is no basis for determining that the jury, acting reasonably, could have believed that mitigating evidence could not be considered in its deliberations unless unanimously found to exist."

Id., at 625. Jimenez, therefore, does not require unanimity in the *existence of* or the *weight given to* any particular mitigating circumstance, but does explicitly require unanimity in the determination of whether mitigating circumstances outweigh the aggravating circumstances. This faithfully tracks NRS 175.554(3)'s requirement that "**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.) It also reads harmoniously with Lisle v. State, 131 Nev. 356 (2015) and Jeremias v. State, 134 Nev. 46 (2018), relied upon by the Court for the proposition that jurors can individually assign whatever weight they deem appropriate to whatever mitigating circumstance they individually find to exist. Barlow 138 Nev. Adv. Op. at 6-7.

The Court then held that "if even one juror determines there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no longer an option." Id. at 7. For this proposition, the Court cited to Bennett v. State, 111 Nev. 1099 (1995). However, Bennett was in a much different procedural posture, in that it was 1) analyzing a post-conviction ineffective

assistance of counsel claim, and 2) dicta in the larger analysis of whether the jury could still return a verdict of less than death when it has found that the aggravating circumstances outweigh the mitigating circumstances. Bennett, 111 Nev. 1099-1110. Neither are at issue here. More troublingly, Bennett was decided in 1995, but this Court overlooked the far more explicit, and recent, holding in Castillo v. State, 135 Nev. 126, 129, 442 P.3d 558, 560 (2019), and misapplied the holdings of Jeremias, and Lisle.

In Castillo, this Court reaffirmed both Jeremias and Lisle, which stood for the proposition "that a defendant is death-eligible in Nevada once the State proves beyond a reasonable doubt the elements of first-degree murder and at least one statutory aggravating circumstance." Castillo 135 Nev. 126. The Court explained that in Jeremias, and as previously described in Lisle, "while some of this court's prior decisions described the weighing of aggravating and mitigating circumstances as part of the death-eligibility determination, … 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." Id. at 128. *Accord* Jeremias 134 Nev. at 58 (holding that "while we have previously described the weighing process as a prerequisite of death **eligibility**, we recently reiterated that it is more accurately described as "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—the '[c]onsideration of aggravating factors together with mitigating factors' to determine **'what penalty shall be imposed.'** " Lisle v. State, 131 Nev. ——, ——, 351 P.3d 725, 732 (2015) (alteration in original) (quoting Sawyer v. Whitley, 505 U.S. 333, 343, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)).")(emphasis added)

The Castillo Court concluded:

> "[T]he facts that expose a defendant to a death sentence, and therefore render him death-eligible for the purposes of Apprendi and Ring, are the elements of first-degree murder and any statutory aggravating circumstance … Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3); NRS 200.030(4)(a), that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed."

Castillo, 135 Nev. at 130.

Castillo's construction shows that the Court, here, envisioned the weighing equation at the wrong time. If Castillo, Jeremias, and Lisle are right, when the jury unanimously determined that Barlow committed first degree murder and determined that at least one valid aggravating circumstance existed then Barlow was death eligible. The question for the jury at that point is *which* sentence to impose. If "the jury" (rather than a juror) determines that mitigating circumstance(s) outweigh the aggravating circumstance(s) then they cannot impose the death penalty. NRS 175.554(3). If "the jury" determines that the mitigating

circumstance(s) *do not* outweigh the aggravating circumstance(s), then it *may*, but is not required to, sentence the defendant to death. Id. While Castillo was decided after Barlow's penalty phase, the decision was a straightforward analysis of statutes and caselaw that existed when Barlow's penalty phase was occurring, and upon which this Court relied here in its published opinion.

This Court held that "[a] hung jury occurs only when the jury cannot unanimously agree on the sentence to be imposed," which is exactly right. Barlow, 138 Nev. Adv. Op. at 8. But the weighing of the mitigating and aggravating circumstance(s) *is part of* determining which sentence should be imposed, not part of determining whether a defendant is death eligible. Castillo, 135 Nev. at 130. And, a jury must unanimously decide whether the mitigating circumstance(s) outweigh the aggravating circumstance(s). Jimenez, 112 Nev. at 625 ("Unanimity is required…"). As such, a jury *can* hang when considering whether the mitigating circumstance(s) outweigh the aggravating circumstance(s), which is precisely what the State argued here, and was the basis for the district court precluding Barlow's argument during the penalty phase.

Castillo, Jeremias, and Lisle were all decided well after Evans, and the jury instruction which Evans mandated be included. Evans v. State, 117 Nev. 609 (2001). However, those cases did not need to explicitly overturn Evans because Evans was primarily concerned with when "other matter" evidence could be

considered. However, to the extent that Evans said that "[i]n deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death-eligible, i.e., after it has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators," this Court has clearly receded from that construction in subsequent cases. Evans, 117 Nev. at 634. That construction in Evans was one of the "prior decisions" that erroneously described the weighing process as part of the eligibility determination. Castillo 135 Nev. at 128. However, Evans can still be read harmoniously because, while the weighing of aggravating and mitigating evidence does not establish death *eligibility*, it is still required to determine whether the death sentence is *properly* imposed.

The district court properly rejected the argument that an individual juror can prevent death *eligibility* by weighing the mitigating circumstances because eligibility is determined prior to the weighing phase. As such, it did not improperly preclude Barlow's argument during sentencing.

### B. This Court Misapprehended the Prosecutor's Argument During Closing

The State argued that the prosecutor did not commit misconduct during closing. Respondent's Answering Brief filed June 16, 2020, at 105-109. This Court held that the prosecutor's argument "implicitly argued that Barlow deserved the death penalty because he killed two people by arguing that a sentence of life

without the possibility of parole might be appropriate if Barlow only killed Woods but was inappropriate because he also killed Cobb." Barlow 138 Nev. Adv. Op. at 9-10. The Court recognized that the prosecutor told the jury that it would be "fine" if the jury decided Barlow did not deserve the death penalty. Id. at 10. However, the prosecutor was more explicit than that and, taken in context, his argument was not improper.

Part of what made Barlow death eligible in the first place was his having committed two murders. If he had "only killed Woods" at least one aggravating circumstance would not have existed in this case. Id. at 10. An aggravating circumstance, by definition, "aggravates" the crime and distinguishes murders which are eligible for the death penalty from those which are not. As this Court recently said: "In a case with multiple victims, it is appropriate for a prosecutor to remind the jury that the loss of each victim's life should be reflected in the sentence imposed. It is inappropriate, however, to suggest that justice requires a death sentence because the defendant killed more than one person." Jeremias, 134 Nev. at 57. The dividing line between appropriate and inappropriate argument, according to this Court, is whether the prosecutor reminds the jury that multiple murders make a death sentence more appropriate, or whether the prosecutor "suggest[s] that justice requires a death sentence." Id. Here, the prosecutors were explicit that a death sentence is never required, but urged the jury to consider

whether death was the appropriate sentence. They walked the narrow line this Court has drawn.

During the first closing, a prosecutor informed the jury that "there's no requirement that [a sentence of death] be done. It's just a punishment that can be considered" if the jury found one or more of the aggravating circumstances. 17 AA 3774. That prosecutor argued that the jury would use a verdict form which included "four different forms of punishment," three of which were life-options. Id. at 3782.

After both of Barlow's attorneys argued that the jury never need impose the death penalty, a different prosecutor in rebuttal closing reiterated that "[t]he law never tells you that the death penalty must be imposed." Id. at 3802. He reiterated that "Mr. Scow and I are going to respect whatever verdict you give. It's the system we live under and it's the system which we accept and believe in. If this jury decides that Mr. Barlow has not earned the penalty, the ultimate penalty, that's fine. But just be certain that when you come back you've done your duty." Id. at 3803. Arguing the totality of the evidence presented to the jury, the prosecutor said that Barlow "tried to kill four people and was successful with two. That's who Mr. Barlow is. And if you go back there and you ask yourself what is justice for someone like that? What do you do with somebody who has had the opportunities of the prison reform that they talked to you about?" Id. at 3807. The prosecutor

argued that even Barlow's counsel told the jury that Barlow "can live out his days" in prison because "[n]obody thinks that there's any sentence other than life without or death in this case." Id. at 3808.

So, when the prosecutor argued that the jury might be considering life without the possibility of parole, or "even the death penalty" had Barlow only killed Woods, and then asked what sentence Barlow deserved considering he also killed Cobb, the prosecutor was imploring the jury to consider all the evidence they had heard to decide, given everything, what sentence was appropriate. Id. at 3809. The very last thing the prosecutor said to the jury was that after the jury reached a verdict "we will respect that verdict." Id.

Nothing in the prosecutor's argument demanded that the jury impose death because Barlow killed both Cobb and Woods. The jury could, and should, consider what sentence was appropriate given the fact that Barlow *had* killed both people, as well as because of all the other aggravating and mitigating circumstances – that was the very decision-making process the jury was obligated to perform. Neither prosecutor, at any time, implied or stated that the death penalty was required, and in fact each explicitly told the jury that it was not. The death penalty was *appropriate*, but not *mandatory*.

After closing argument, Barlow objected that the prosecutor had argued that if the jury gave "life without for this guy then death is required for this second

death." 17 AA 3813. The district court, having just listened to the argument, correctly understood it: "[A]sking the jurors to essentially walk up the ladder of moral culpability from a punishment standpoint, depending on the nature of a case, that's not inappropriate. … If a case has multiple victims, is that an argument that can be made? Sure. I don't think there was anything that was said that because there's two, that automatically equates to death or you have to give him death because of one to be meaningful to the other. … I mean, there are quite simply multiple victims." 17 AA 3815-16. After two hours, Barlow presented additional authority, but none of the cases were like the argument the State made in closing. Id. at 3816-21.

There was not prosecutorial misconduct in closing under the line drawn in Jeremias, and this Court erred in deciding otherwise. Jeremias explained how a multiple-murder-aggravator argument should proceed. The Jeremias Court also approvingly cited Burnside v. State, which held that arguing that returning a death sentence would "give value to [the victim's] life and compensation to his family." 131 Nev. 371, 404, (2015). While Burnside was a single-murder case, if arguing that returning a death sentence to "give value" to the victim's life is proper for a single victim, what could make it improper to argue the exact same thing in a two-victim case? According to Jeremias (and Burnside), the argument was not harmless misconduct, but was instead "not improper." Jeremias, 134 Nev. at 57; Burnside,

131 Nev. at 404. Arguing that returning a death sentence is "appropriate" is "not improper" under Jeremias and Burnside, it is only improper to argue that a death sentence is "required." The prosecutor here never argued that a death sentence was required, so the argument was "not improper."

To the extent that this Court intends to hold that such argument is, now, improper, the State submits that the Advanced Opinion issued, at 9-10, should be revised to clarify that the argument was not improper when it was made, and to clarify in what manner the State should properly argue a valid aggregator where multiple victims were killed such that the jury can consider the aggravating nature of each additional death while still not being required to impose death.

### C. This Court Erred in Reversing the Penalty Phase Based on Cumulative Error

For the reasons stated in Section A and B, *supra*, the district court did not err in precluding Barlow's argument during penalty phase, and the prosecutor did not commit misconduct during closing. The only other error this Court identified was that one aggravator was not properly noticed. The State is not challenging that determination, but "[o]ne error is not cumulative error." United States v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000).

Even assuming the Court maintained that the district court erred in precluding Barlow's argument about the deliberative process, the State submits that Barlow was able to, and did, argue that death was never required regardless of

how the jury weighed the aggravating and mitigating circumstances. Nothing in the district court's ruling precluded Barlow from arguing that *even if* the jury determined that no mitigating circumstance(s) outweighed the aggravating circumstance(s) they were not required to impose death. In fact, Barlow's counsel did argue that. 17 AA 3782-3799. Although this Court already held that the district court's preclusion of Barlow's argument that a single juror could determine that mitigation outweighs aggravation was harmless, Barlow's argument that whether mitigation outweighed aggravation or not the jury could still vote for a life-option was not only more correct, but more powerful. 17 AA 3785. That argument was also "important and legally accurate," and required less from the jury than an argument that they did not have to sentence Barlow to death under any circumstances. Barlow 138 Nev. Adv. Op. at 16. If there were any error at all, then, it was even more harmless than the Court already considered it. Accordingly, the State submits that this Court erred in making its cumulative error analysis, and the penalty phase should not have been reversed.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court undertake the NRS 177.055 review of Barlow's death sentences and affirm the judgment of conviction and sentence in their entirety. Alternatively, the State respectfully requests that the Advanced Opinion be modified as argued in Section

B, *supra*, or as this Court believes justice requires.

Dated this 2nd day of May, 2022.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it 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 petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 3,125 words and 279 lines of text.

Dated this 2nd day of May, 2022.

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 May 2nd, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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