No. 17-6255

OCTOBER TERM, 2017

# In the Supreme Court of the United States

DAVID STEPHEN MIDDLETON,

Petitioner,

v.

TIMOTHY FILSON, Warden,

Respondent.

*On Petition for Writ of Certiorari to the Nevada Supreme Court*

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a capital case involving the extreme and unusual factual circumstances of a defense attorney switching sides in the same case to represent the State in the instant habeas corpus proceeding. The State disputes this characterization of the record but acknowledges the essential facts: Joseph Plater, a former defense attorney, was sent into the jail before trial and obtained privileged information from Middleton about the case. BIO at i, 2-5. Later, Plater was assigned by a supervisor from the Washoe District Attorney's Office ("WCDA") to represent the State in this habeas proceeding, despite his revelation of his prior contact with Middleton as a defense attorney. BIO at 6. The State does not mention the pleadings filed by Plater in the trial court (App. 668-675) or Middleton's argument that they covered privileged matters that he discussed with Plater, but it acknowledges Plater's authorship of the findings of fact and conclusions of law that were entered by the state court in the current habeas corpus proceeding. BIO at 6.

The State argues this case does not warrant this Court's plenary review because Middleton "asserts that the state court made erroneous factual findings and/or misapplied state law in finding that Middleton was not entitled to relief." BIO at 13. To the contrary, Middleton does not challenge the state court's factual findings or the Nevada Supreme Court's application of state ethical law to his case as the latter issue is not cognizable before this Court. He does argue that the state court failed to address his federal constitutional claims based upon Plater's substantial participation in this case, including his authorship of the judicial findings of the court.

The State entirely fails to address Middleton's argument that his right to the assistance of counsel was violated, potentially because Plater was not ultimately appointed to represent Middleton at trial. However, this Court's precedents require the states to affirmatively honor and protect Middleton's choice to seek the assistance of counsel. *See, e.g., Maine v. Moulton*, 474 U.S. 159, 170-71 (1985). The State also does not address the federal due process violations resulting from Plater's involvement other than citing the Nevada Supreme Court's finding, under state ethical law, rejecting Middleton's argument "that Plater's conflict renders it unlikely that appellant will receive a fair appeal absent disqualification of the entire WCDA's office." BIO at 14.

This Court's plenary review is warranted because the Nevada Supreme Court's failure to address Middleton's federal constitutional arguments led to a decision that was contrary to a uniform consensus reached by every state and federal court faced with the (rare) circumstances of a defense attorney switching sides to the prosecution in the same case. Middleton acknowledged that most of these decisions were based upon state ethical law, but argued that the uniformity of these authorities established an outer boundary where constitutional lines could be identified. The State does not address the egregious facts of this case or the Nevada Supreme Court's decision by reference to this uniform body of contrary authority.

The State does not address Middleton's arguments that this case is appropriate for summary disposition by this Court. Summary reversal is appropriate whether the Nevada Supreme Court failed to address the arguments raised by Middleton, *see,*

*e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (*per curiam*) (granting petition and summarily reversing when the state court affirmed the conviction "without examining the specific constitutional claims" raised by the defendant), *cf. Beer v. United States*, 564 U.S. 1050, 1050 (2011) (*per curiam*), or whether it did address them but arrived at a conclusion so far outside the mainstream of judicial decision making that summary reversal is appropriate. *See, e.g.*, *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (*per curiam*). Neither the State nor the state court has addressed the federal constitutional violations that occurred in this habeas proceeding due to Plater's involvement. Summary reversal is therefore appropriate even if the State is correct that the issues here do not fit within the traditional class of cases described in Supreme Court Rule 10.

The State suggests that Middleton's federal constitutional claims were not properly raised in state court for this Court's review, although it does not say so directly, and it argues elsewhere that the Nevada Supreme Court actually decided the issues in this case. BIO at 14. The State argues Middleton "did not request any remedy other than disqualification, which is perhaps why Middleton chose to omit from his own appendix the very motion he claims was wrongly decided and merits review." BIO at 2. Middleton's initial motion to disqualify the WCDA argued that Plater's failure to remove himself from the case violated Middleton's federal constitutional rights to due process and the assistance of counsel. RA 7. Middleton's supplemental brief, filed with leave of the Nevada Supreme Court, reiterated the federal constitutional arguments previously raised and argued the Nevada Supreme

Court was obligated to adopt a remedy to address the prejudice resulting from Plater's involvement, including reversal of the case for the re-initiation of the habeas proceedings before a special prosecutor. RA 64-65 (arguing an effective ethical screen could not be created "because the harm has already occurred, as Plater authored the judicial findings of the court below that are the subject of the instant appeal," RA 64). Middleton's briefing was therefore not limited to a request for disqualification, as the State asserts.

The State's suggestion that Middleton did not preserve the issue for which he seeks review is also inconsistent with the position that it took before the Nevada Supreme Court. In his petition for rehearing, Middleton reiterated the arguments he made throughout the proceedings that the Nevada Supreme Court erred in failing to address his federal constitutional claims relating to Plater's involvement in the case. Supp. App. 044-046. In response, the State argued that Middleton's claims were barred under Nevada Rule of Appellate Procedure 40(c)(1) as they had been previously raised and rejected by the court:

> The petition for rehearing rehashes the arguments concerning the involvement of Deputy District Attorney Joe Plater. This was thoroughly argued and rejected before the briefing in this case and the petition for rehearing raises nothing new. NRAP 40 does not allow the repeated presentation of the same argument.

Supp. App. 054-55. As explained above, the State took the position in state court that the briefing it has included in respondent's appendix was sufficient to raise the federal constitutional issues argued by Middleton. Those same arguments were also reiterated at length in Middleton's reply brief, filed September 2, 2015, Pet. Reply

Brief at 4-14, Supp. App. 014-024, and in a motion for limited remand, filed on September 15, 2015, Pet. Motion for Remand at 1, Supp. App. 028. The procedural history above shows that Middleton adequately raised the federal constitutional issues for review for which he seeks certiorari.

## CONCLUSION

For the foregoing reasons, Middleton respectfully requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court. In the alternative, he requests that this Court grant the petition and summarily reverse the judgment of the Nevada Supreme Court.

DATED this 27th day of November, 2017.

Respectfully submitted,

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APPENDIX Supp. App. No.

# SUPPLEMENTAL APPENDIX A

**Excerpt of Appellant's Reply Brief, Middleton v. Baker, Nevada Supreme Court, Case No. 62869 (September 8, 2015)**

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * *

DAVID STEPHEN MIDDLETON,

Petitioner,

vs.

RENEE BAKER et al.,

Respondents.

Case No. 62869



**APPELLANT'S REPLY BRIEF**

Appeal from Order Dismissing Petition for
Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

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**MISCELLANEOUS**

## I. Introduction

Until now, this Court has been deprived of the opportunity to fashion an appropriate remedy for the State's pervasive, continuing misconduct which has violated Middleton's constitutional rights. From the time of Middleton's arrest until now, the State has interfered with Middleton's right to counsel, has presented false evidence at trial, and has made factually inconsistent statements to this Court to minimize the prejudicial effect of its presentation of false testimony. Yet because of the failures of first state post-conviction counsel, this Court has not considered the overall pattern of misconduct and so has not been given an opportunity to fashion an appropriate remedy. This, coupled with the related harm Middleton suffered by being represented by conflicted trial and appellate counsel-- a conflict abetted by the State--requires this Court to fashion an appropriate remedy for this pervasive State misconduct which amounts to a due process violation. Rochin v. California, 342 U.S. 165, 169-72 (1952).

Middleton requests that his convictions and sentences be reversed. In the alternative, the death sentences must be permanently stricken and the State must be prevented from seeking the death penalty in any future proceedings. A special prosecutor must also be appointed because of the continuing, troubling conflict of interest held by the Washoe County District Attorney's Office (WCDA). At the very least, Middleton must be allowed to return to the district court and begin his state

habeas process anew. This proceeding should be merged with the petition that Middleton filed in August 18, 2014, as the issues asserted therein regarding prosecutorial misconduct and actual innocence are interrelated.

The State accuses Middleton of falsely representing the record to this Court regarding Dora Valverde's trial testimony concerning her sister Davila's ownership of a pink plaid blanket, testimony which in fact falsely implicated Middleton. AB at 14.[1] As shown below, the State misrepresents the record. The State's allegation is especially egregious because it relied on this false testimony (as did this Court in its analysis on appeal) to convict Middleton and affirm the judgment. Yet the State has now disavowed its position at trial and in these proceedings that the blanket was owned by Davila. In fact, the State has now moved for new biological testing of evidence in the court evidence vault in the hopes that it will tie Middleton to other, unrelated crimes.

The State's Answering Brief also does little to assist this Court in deciding the issues involved in the instant appeal. Over the course of a mere 20 pages, the brief meanders in a breezy fashion between alleged procedural bars and purported substantive deficiencies in Middleton's constitutional claims. Consequently, the State fails to address most of the material issues that Middleton raises in his Opening

[1] In this Reply, Respondent's Answering Brief is denoted as "AB" and Appellant's Opening Brief as "OB."

Brief. The failure of the State to contest Middleton's arguments is treated as an admission by this Court. Polk v. State, 126 Nev. 180, 233 P.3d 357, 361 (2010) (citing NRAP 31(d)). Instead of a thorough response, the State picks "an example or two" (AB at 11), to illustrate how Middleton has supposedly not pleaded sufficient facts to show how prior state post-conviction counsel were ineffective.

Finally, the State also complains that Middleton failed to attach to the current Opening Brief prior post-conviction counsels' supplemental petition filed August 2, 2005. (AB at 2, fn.2.) The State is incorrect. That supplemental petition was previously included in Middleton's appendix. 41AA10156-10232, 42AA10233-10380. Furthermore, nothing prevented the State from attaching anything it believed to be relevant to this appeal. See NRAP, 30(b)(4). The State accuses Middleton of omitting other documents from the appendix, AB at 3, fn.3; AB at 8, fn.5, but it never bothers to explain the relevance of the omitted documents, and it does not include them in an appendix.

This reply brief will begin by addressing the ongoing statutory, ethical, and constitutional violations that infect the instant habeas proceeding, which require a reversal and remand for the re-initiation of the habeas proceeding. Middleton will then address the State's procedural arguments that were relied upon by the district court to preclude consideration of Middleton's claims of ineffective assistance of first state post-conviction counsel.

Middleton will also briefly identify material points that are not addressed by the State and respond to portions of the Answering Brief where additional comment is likely to be helpful to the Court in deciding this case. To the extent possible and consistent with that objective, repetition of earlier briefing will be avoided. The absence of additional comment on all aspects of the Opening Brief in this reply should not be taken as a concession of any nature regarding the merits of the matters not addressed.

## II. Argument

### A. The State Does Not Address the Constitutional Violations that Infect the Instant Habeas Proceeding or the Continuing Ethical and Constitutional Violations Resulting from the Washoe County District Attorney's Continued Involvement in this Case.

#### 1. The Order Before the Court is Invalid as it was Authored by a Disqualified Attorney and the Appeal Must be Remanded for the Initiation of New Habeas Proceedings.

Before addressing the State's arguments, it is important to point out that neither the State nor this Court has addressed Middleton's argument that the order being reviewed in this appeal is fatally defective because it was drafted by an attorney for the State who has been disqualified from this case. After the filing of Middleton's Opening Brief, this Court remanded the case to the trial court to determine whether counsel for the State, Joseph Plater, formed an implied attorney-client relationship with Middleton and/or received confidential information from

Middleton when they met to discuss the case in January of 1996. In its subsequent order, this Court ordered Plater disqualified from the appeal because he received privileged information from Middleton concerning the issues presented in the instant petition:

> the district court found that there was a reasonable probability that Plater and appellant exchanged privileged information, as appellant 'presented unrefuted evidence that he conveyed certain information, which, by its very nature, is of the type that is not intended to be disclosed to third persons.' That finding is supported by the evidence developed at the evidentiary hearing. . . . [M]atters discussed at the meeting included such topics as appellant's criminal history, his conversations with the police and the prosecution, his thoughts about the case, results of his mental health evaluations, and potential investigations and issues that could be raised in the case.

Order Granting in Part and Denying in Part Motion to Disqualify, at 3-4 (filed February 27, 2015).

While this Court disqualified Plater from the appeal, it failed to acknowledge Middleton's claim that the findings of fact and conclusions of law that were drafted for the trial court's signature and signed verbatim in pertinent part by the court were authored by Plater. The Court also did not acknowledge the testimony of Plater at the evidentiary hearing that he was the author of the order, and that he was the first individual for the State who addressed certain topics that were also discussed in confidence with Middleton, such as the confidential mental health evaluations. IISA263-66, 271. This Court did not address Middleton's argument that the

privileged information received by Plater could be significantly harmful to Middleton's legal interests. NRPC 1.18(c).

Plater's authorship of the order that is currently being reviewed by this Court renders it fundamentally defective and requires reversal and reconsideration by a different district court judge.[2] This Court has summarily reversed orders of the district court where the court "refused to provide an explanation for its decision," State v. Greene, 129 Nev. __, 307 P.3d 322, 322 (2013), and where "the State, without obtaining a new ruling and without advising [the petitioner] or his counsel, submitted to the district court a new proposed order, which the district court signed and filed without advising the parties before it or notifying [the petitioner]." Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007). The order before this Court in the instant case is even more problematic than the orders in Greene and Byford because it was authored by an attorney for the State who received privileged information from Middleton on the very same topics that were covered by the order. Cf. Ex parte Ingram, 51 So.3d 1119, 1123-25 (Ala. 2010) (order invalid when it relied upon personal knowledge of different judge than the one who signed the order). That crucial fact was unknown to the judge who signed the order involved

[2] The order being reviewed by this Court was issued in Department 10 whereas Middleton's case is currently assigned to Department 9. This appeal therefore need not be assigned to a different district judge on remand.

in this appeal. Federal courts are in accord that "orders" by a state court that are produced in similar, but not nearly as egregious, circumstances are defective and should receive no deference on federal habeas corpus review. See Jefferson v. Upton, 560 U.S. 284, 292-94 (2010) (per curiam).

Just as important, the State does not address Middleton's arguments from the motion to disqualify based upon the grounds that Plater's actions in this case violated state and federal rights to due process and the right to counsel. Cf., e.g., United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985) ("due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter."). The disqualification of Plater from the instant appeal does not address the constitutional errors that infect the entirety of the instant post-conviction proceeding. This error is particularly prejudicial in light of the facts of Middleton's case, where the State has interfered with his right to counsel in every prior state proceeding to obtain a tactical litigation advantage. Reversal of the district court's decision and a remand for the re-initiation of new habeas proceedings is required on this basis alone.

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2. **This Court's Disqualification Order Fails to Acknowledge the Serious Ongoing Violation of Middleton's State and Federal Constitutional Rights Resulting from the Washoe County District Attorney's Continued Involvement in this Case and in any Future Potential Criminal Prosecutions.**

In his motion to disqualify the WCDA, Middleton argued that the entire prosecutor's office must be disqualified from representing the State in the instant appeal and from prosecuting him for any other criminal offenses due to the complete and repeated institutional breakdown in the office regarding the handling of Plater's conflict of interest; the failure to create a timely ethical screen; and the fact that the office sought to exploit its own misconduct by attempting to breach the attorney-client relationship at the evidentiary hearing in order to elicit testimony from Middleton regarding missing persons cases that are currently being investigated by the WCDA and law enforcement entities in other states. ISA109-10; see ISA33-94. Middleton argued that the WCDA's continued involvement in this case or in any other potential prosecution of him in the future would make it unlikely that he would receive a fair adjudication under State v. Eighth Judicial District Court (Zogheib), 130 Nev. __, 321 P.3d 882, 883 (2014). Middleton further argued that continued involvement of the WCDA in this case violated (and continues to violate) his state and federal constitutional rights to due process and to counsel. See, e.g., Coleman v. State, 109 Nev. 1, 3-4, 846 P.2d 276, 277-78 (1993); United States v. Schell, 775

F.2d 559, 565 (4th Cir. 1985) (defense attorney's subsequent prosecution of former clients in same matter "was per se prejudicial").

This Court's order denying Middleton's motion for imputed disqualification completely ignores the WCDA's repeated institutional breakdown, its exploitation of its misconduct in the proceedings below, the plain language of the ethical rules of this state, and this Court's published decisions interpreting them. In denying Middleton's motion for imputed disqualification of the WCDA, this Court found that

> Nothing in the record indicates that Plater disclosed any privileged information to any other members of the WCDA's office. Plater's testimony that at some point in time before he was assigned to this appeal he told his supervising attorney that he had spoken to appellant and that he was not screened from this appeal is insufficient to justify disqualifying the entire office in the absence of any evidence of disclosure of confidential information.

Order at 4. This Court cited no authority justifying its refusal to order imputed disqualification on the theory that Middleton could not prove that the conflicted attorney actually shared privileged information, and there is no such authority. On the contrary, this Court's own ethical rules apply when confidential information is "received" by the conflicted attorney. NRPC 1.18. In interpreting its ethical rules, this Court has clearly held that there is a presumption of shared confidences. See, e.g., Ryan's Express Transp. Serv. v. Amador Stage Lines, Inc., 128 Nev. __, 279 P.3d 166, 170 n.2 (2012). Federal courts interpreting this state's ethical rules have

also clearly rejected the "I forgot the conversation" defense as one capable of defeating imputed disqualification. See, e.g., Coles v. Arizona Charlie's, 973 F. Supp. 971, 973 (D. Nev. 1997). The issue of whether Middleton can prove that Plater specifically remembers the conversation or told anyone in the office about the disqualifying facts also does not alter the fact that Middleton's right to due process and to the assistance of counsel have been violated.[3] The evidentiary burden that this Court concocted out of whole cloth has no basis in the ethical rules and is contrary to this Court's own published case law, and such a standard effectively exempts the WCDA from ever having to comply with any ethical standards whatsoever regarding the handling of conflicts of interest. This Court simply failed to acknowledge the appropriate presumption in Middleton's case from Ryan's Express, which requires the WCDA's disqualification and reversal and a remand for the re-initiation of the habeas proceedings with a special prosecutor.

Equally problematic is the fact that this Court has taken no measures whatsoever to ensure that an effective ethical screen could be (or has been) established in the instant case by the WCDA. This Court ordered that the WCDA

[3] See Schell, 775 F.2d at 563 (finding federal constitutional violations where disqualified attorney with the prosecutor's office testified "that he did not know of any incriminating evidence against" his former clients and "asserted that he was not aware of the evidence to be presented against them nor the acts which comprised the charges in the indictment").

"must screen Plater from any further exposure to this case." Order at 5. However, this Court did not acknowledge the testimony at the evidentiary hearing that Plater had at that point been involved in the case for a substantial period of time; that his work product had not been segregated from other work product in the office; that the files are not locked; and that there was no ethical screen in existence. IISA251-54. This Court did not acknowledge that the crucial facts showing the institutional failure of the WCDA in this case was not disclosed by Plater to this Court in his sworn affidavit, IISA316, and it was also not disclosed to the tribunal until Middleton's counsel elicited those facts from Plater on cross-examination. Contra NRPC 3.3(a)(3) (candor to the tribunal). The WCDA previously argued the patently absurd position to this Court that Plater had screened others from the office away from the case. IISA314-18 (arguing that "Middleton has not challenged the sufficiency of the screening measures put in place by the district attorney's office to preclude this counsel's direct or indirect participation in this case"). Plater was the author of this pleading and counsel of record for the State when he made this representation to this Court. In such circumstances, it should go without saying that it was impossible for the WCDA to comply with this Court's order to create an effective ethical screen.

In such circumstances, Middleton is entitled to a remand for an evidentiary hearing to determine whether an effective ethical screen has been (or even could be)

created. As explained above, effective screening "may be used to rebut the presumption of shared confidences." Ryan Express, 279 P.3d at 170. According to this Court, an evidentiary hearing is required in such circumstances to allow the State to rebut the presumption that the Court incorrectly placed upon Middleton:

> When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is on the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.

Id. at 172. Given the complete and repeated institutional failure of the WCDA to recognize and properly handle the conflict; to understand what an ethical screen means; and to take any remedial measures on its own, indicates even more of a reason in the instant case for Middleton to receive an evidentiary hearing on whether the WCDA has created an effective ethical screen. In Ryan Express, this Court found sworn affidavits from counsel to be insufficient to obviate the need for an evidentiary hearing. Id. at 172. This Court accordingly exercised its "inherent authority [to] remand the matter to the district court for an evidentiary hearing to demonstrate the sufficiency of the screening measures adopted by [the office]." Id. at 173.

In this case, however, this Court has required no proof whatsoever from the WCDA, not even sworn representations, that an effective ethical screen has been (or

could be) created and no evidentiary hearing was ordered. The Court failed to acknowledge Middleton's position in his prior briefing, where he argued that it was impossible to create an ethical screen at such a late time when so much damage has already been done and where the institutional failures of the WCDA are so pronounced and egregious. This Court is required to afford Middleton, a capitally convicted habeas petitioner, the same rights as a civil litigant to a remand for an evidentiary hearing on the adequacy of the screening measures taken by the WCDA. There is certainly no rational basis for the difference in treatment of Middleton versus every other litigant in this state. Cf. Myers v. Ylst, 897 F.2d 417, 421-22 (9th Cir. 1990) (equal protection requires similar treatment of similarly situated litigants by state courts applying state law).

Just as above, Middleton's constitutional rights to due process and to counsel were violated due to the WCDA's misconduct in the instant case. "[T]he government's misconduct in this case was designed to and would give the prosecution an unfair advantage" during this habeas proceeding, during the evidentiary hearing, and in any future potential prosecutions. See United States v. Marshank, 777 F. Supp. 1507, 1521 (N.D. Cal. 1991). The WCDA gained an unfair advantage when the supervisor of the criminal appeals unit placed Plater on Middleton's case rather than timely screening him after learning of the disqualifying facts. IISA251-54, 266. The WCDA gained an unfair advantage at the evidentiary

hearing because it had every intention of further breaching the attorney-client privilege and attempting to elicit incriminating information from Middleton regarding the other missing persons investigations that it is presently conducting. ISA109-10; see ISA33-94. As in Marshank, the remedy that is necessary to address this continuing violation of Middleton's constitutional rights is the imputed disqualification of the WCDA, the re-initiation of the habeas proceeding, and the permanent setting aside of the death penalty in this case (and a bar to any future capital prosecutions) to prevent the State from continuing to profit from its misconduct. See id. at 1522, 1525 ("As with a Fifth Amendment violation, a violation of the Sixth Amendment requires a remedy tailored to the injury suffered.").

**B: Middleton's Petition is Not Barred Under Laches.**

**1. NRS 34.800(2) Does Not Bar Middleton From Vindicating His Right to the Effective Assistance of First State Post-Conviction Counsel.**

In his Opening Brief, Middleton argued that the district court erred in denying him the ability to vindicate his right to the effective assistance of first state post-conviction counsel by holding that he was barred from doing so under NRS 34.800(2). OB at 21-22. As applied to Middleton, this purportedly meant that his ability to challenge post-conviction counsel's ineffectiveness expired in 2003, which was years before post-conviction counsel whose performance is being challenged

was even appointed to represent him, and was six years before this Court affirmed the denial of habeas corpus relief, in 2009. The State's Answering Brief simply repeats the district court holding. AB at 4-7. However, the State makes no attempt to address the authorities cited by Middleton which repel the district court's procedural ruling.

The State appears to acknowledge that the claims in Middleton's instant petition are appropriately before this Court as allegations of cause-and-prejudice. According to the State, Middleton's "various claims [were] suitable for direct appeal or the first post-conviction action but they have no relationship to the order giving rise to this appeal." AB at 20-21. Middleton agrees with the State that the claims in his current petition should have been raised by effective state post-conviction counsel in the prior habeas proceeding, including claims of ineffective assistance of counsel on direct appeal for failing to raise meritorious constitutional issues. Contrary to the State's arguments, Middleton was obligated to plead those facts in his Opening Brief in order to demonstrate prejudice under NRS 34.726(1)(b), and 34.810(3)(b), to overcome the procedural bars that have been raised by the State. The State acknowledges that "Middleton was indeed entitled to the effective assistance of post-conviction counsel but that does not address the issue." AB at 9. However, the State fails to advance a credible argument as to when Middleton supposedly should have filed a second state petition in order to vindicate that right.

## SUPPLEMENTAL APPENDIX B

Excerpt of Motion for Limited Remand, Middleton v. Baker, Nevada Supreme Court, Case No. 62869 (September 18, 2015)

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Electronically Filed
Sep 18 2015 03:43 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

DAVID STEPHEN MIDDLETON,

Petitioner,

vs.

RENEE BAKER et al.,

Respondents.

Case No. 62869

**MOTION FOR LIMITED REMAND**

Appellant David Stephen Middleton hereby moves this Court for an order remanding this appeal to the district court for further proceedings. This motion is brought pursuant to NRAP 27(a)(1) and SCR 250(8)(b), and is made and based on the following points and authorities and the entire file herein.

DATED this 18th day of September, 2015.

Respectfully submitted,

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Docket 62869 Document 2015-28402

## I. Introduction

Briefing in this appeal was completed with the filing of Middleton's reply brief on September 1, 2015. In the reply, Middleton argued that his constitutional rights were violated and further that the order being reviewed in this appeal is defective because it was drafted by an attorney from the Washoe County District Attorney's Office ("WCDA") who has been disqualified by this Court due to his receipt of privileged information from Middleton. Reply Br. at 4-7. Middleton further argued that the continued involvement of the WCDA in this case violated his constitutional rights as well as the ethical rules. Id. at 8-14. Middleton argued that he was entitled to a remand to the trial court to determine whether the WCDA has created an effective ethical screen pursuant to Ryan's Express Transp. Serv. v. Amador Stage Lines, Inc., 279 P.3d 166, 172 (Nev. 2012). The circumstances described above arose after the filing of Middleton's opening brief with this Court, and Middleton is entitled to a limited remand in order for the district court to address these issues.

Middleton also seeks a remand from this Court to address other constitutional issues whose factual bases only became available to him after the district court's dismissal of his petition. Cf. Lisle v. State, 351 P.3d 725, 729 (Nev. 2015) (requiring petitioner to "demonstrate that his Brady claims were raised within a reasonable period of time after discovery of the withheld evidence"). Middleton filed a petition in the district court on August 18, 2014, raising these issues. See Exs. 1-50.

Middleton argued that the claims raised in the petition were not procedurally defaulted as they were raised within one-year of the date that the factual bases of the claims became available, and also that he could obtain review of those issues based on his argument that he is factually innocent of the murder of Thelma Davila. Id. at 2-4, 13. However, Middleton has been unable to proceed on this petition due to the pendency of this appeal with the Court. Ex. 51.

For the reasons stated in the reply brief, Middleton seeks an order of remand from the Court to determine whether an adequate ethical screen has been created by the WCDA pursuant to Ryan's Express.[1] For the reasons stated below, Middleton also seeks an order from the Court remanding his case to the district court to consider the procedural issues pertaining to this appeal and the August 2014 state petition together, so that the district court can properly consider Middleton's allegations of prosecutorial misconduct, cumulative error, and actual innocence.

## II. Argument

Middleton seeks a remand from this Court because events that have occurred subsequent to the district court's dismissal of the petition make it appropriate to decide the issues contained in this appeal together with the issues contained in the petition that was filed on August 18, 2014. As explained in the opening brief, a pink

[1] Middleton also sought an order from the Court disqualifying the WCDA from this case and from any potential criminal prosecutions in the future, and an order remanding the case for the re-initiation of the proceedings in Department 9.

## SUPPLEMENTAL APPENDIX C

**Petition for Rehearing, Middleton v. Filson, Nevada Supreme Court, Case No. 62869 (January 30, 2017)**

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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| DAVID STEPHEN MIDDLETON,<br><br>Petitioner,<br><br>vs.<br><br>TIMOTHY FILSON, Warden; and ADAM PAUL LAXALT, Attorney General for the State of Nevada,<br><br>Respondents. | Case No. 62869<br><br>(Death Penalty Habeas Corpus Case) |

## PETITION FOR REHEARING

Appellant David Middleton hereby petitions this Court for rehearing from its order affirming the denial of post-conviction relief on December 21, 2016.[1] Rehearing is required because this Court's decision overlooked the United States Supreme Court's recent decision in Hurst v. Florida, 136 S. Ct. 616 (2016), which directly controls the disposition

[1] On January 17, 2017, this Court granted Middleton's motion requesting an extension of time to January 30, 2017, in which to file a timely petition for rehearing.



Docket 62869 Document 2017-03279

of the Sixth Amendment claim raised in Middleton's habeas petition. NRAP 40(c)(2)(B). Rehearing is also required because the Court overlooked material facts in the record and material questions of law in this case. NRAP 40(c)(2)(A).

### A. Rehearing is Required to Address Middleton's Sixth Amendment Claim in Light of Hurst v. Florida, 136 S. Ct. 616 (2016)

In its decision, this Court rejected Middleton's procedural and substantive arguments challenging the penalty instruction given in his case (Slip Op. at 25 (Nev. December 21, 2016)) for failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that mitigation was not outweighed by statutory aggravating circumstances. The Court relied upon its decision in Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 253 (2011), to hold "that the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the beyond-a-reasonable-doubt standard[.]" Slip Op. at 25. The Court also cited Kansas v. Carr, 136 S. Ct. 633, 642 (2016), to reiterate "that the weighing of aggravating and mitigating circumstances is not subject to the beyond-a-reasonable-doubt

standard." Id. Finally, the Court held that "Middleton's claim regarding the weighing instruction is not an appropriate basis for an actual innocence claim[.]" Id.

In Hurst v. Florida, 136 S. Ct. 616 (2016), the Court held that the weighing of mitigation against statutory aggravating circumstances in the Florida capital sentencing scheme must be made by the jury to comport with the Sixth Amendment. Hurst requires the jury to make the "findings" that "sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 622. The Court invalidated the sentencing scheme because "Florida does not require the jury to make the critical findings necessary to impose the death penalty." Id.[2] The Court also acknowledged the jury trial "right, 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.

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[2] See also Woodward v. Alabama, 134 S. Ct. 405, 410-12 (2013) (Sotomayor, J., dissenting from the denial of certiorari, joined by Breyer, J.) (trial court's rejection of "the jury's finding that the mitigating circumstances outweighed the aggravating circumstances" violates the Sixth Amendment).

Hurst is controlling authority that requires the Court to reconsider its decision rejecting Middleton's Sixth Amendment claim and to overrule its decision in Nunnery. Nunnery is predicated upon the fact that it remained an open question after Ring v. Arizona, 536 U.S. 584 (2002), whether the jury trial right applied to the outweighing of mitigation against statutory aggravating circumstances. Nunnery, 127 Nev. at 772 n.9, 263 P.3d at 251 n.9 (noting "the Court expressly did not address the finding of mitigating circumstances or the weighing of aggravating circumstances and mitigating circumstances"). Given Nunnery's acknowledgment that "the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum," id. at 772, 263 P.3d at 250, this Court must now hold, in light of Hurst, that the jury trial right extends to the outweighing finding. Middleton notes that the Florida Supreme Court on remand in Hurst and the Delaware Supreme Court have both recognized that the outweighing finding of mitigation over statutory aggravating circumstances must now be made by a jury. Hurst v. State, 202 So.3d 40,

53, 61 n.17 (Fla. 2016); Rauf v. State, 145 A.3d 430, 434 (Del. 2016). This Court must do so as well.

The High Court's decision in Kansas v. Carr, 136 S. Ct. 633 (2016), does not alter this result. Carr was an Eighth Amendment case where the Court addressed and rejected the defendant's claim that his death sentence was invalid because the jury was not expressly instructed that it did not need to find that a mitigating circumstance existed beyond a reasonable doubt before it could be considered. Id. at 642-44. Carr had no occasion to address the weighing of mitigating and aggravating circumstances because the Eighth Amendment does not require states to have statutory schemes where the jury must "balance aggravating against mitigating circumstances pursuant to any special standard." Zant v. Stephens, 462 U.S. 862, 873-74 (1983). Carr also had no occasion to address the penalty instructions as "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate[.]" Kansas v. Marsh, 548 U.S. 163, 173 (2006). This Court erred in relying upon Carr as authority for

what the Sixth Amendment requires, particularly when the statutory scheme in Kansas already required the outweighing determination be made by a jury beyond a reasonable doubt.

Carr is also inapposite because the weighing determination in Kansas is part of the selection phase of a capital sentencing hearing. Carr, 136 S. Ct. at 642; Marsh, 548 U.S. at 174. As a consequence, a Kansas jury considers intangible factors such as mercy when conducting its weighing determination in order to select the appropriate sentence. Id. Unlike Kansas, the weighing determination in Nevada is part of the death eligibility phase of the sentencing proceeding. NRS 175.554(3); NRS 200.030(4). Only after the jury finds a defendant death eligible is it permitted to consider other matter evidence pertaining to his/her character and to make a moral judgment regarding the appropriate sentence. NRS 175.552(3). The intangible factors cited in Carr that comprise the moral judgment of the sentencer – and that make weighing less of a factual determination – do not exist when a Nevada jury conducts its eligibility weighing determination. The factual differences between the death penalty statute in Kansas and the Nevada capital

sentencing scheme show both why Carr is inapposite and also why this Court erred in Nunnery in embracing the holdings of other state supreme courts with different statutory schemes. See Nunnery, 127 Nev. at 774-75 & n.11, 263 P.3d at 252-53 & n.11.

For over two decades, this Court has treated the death eligibility weighing phase of a capital sentencing as a factual determination. In Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993), this Court acknowledged the weighing of aggravating and mitigating circumstances was a "factual determination." Id. at 881-82, 859 P.2d at 1034-35 (citing Clemons v. Mississippi, 494 U.S. 738, 748-49 (1990)). Since Canape, this Court has never shirked from deciding for itself whether a capital defendant was death eligible under Clemons. And not once during that time has this Court ever suggested that it considers intangible factors such as mercy as capital juries can and do when they select the appropriate sentence in a capital case. In light of Hurst, this Court can no longer ignore the glaring inconsistency between Canape and Nunnery. See Nunnery, 127 Nev. at 776 n.13, 263 P.3d at 253 n.13 (noting tension between the two positions). In short, if this Court intends to continue to

perform harmless error analysis in capital cases then it must also hold that the weighing process in Nevada is a factual determination to which the right to a jury trial applies.

There is nothing else to justify this Court's failure to apply Hurst correctly to Nevada's capital sentencing scheme and to overrule Nunnery. In Nunnery, this Court side-stepped the issue by engaging in a tortured deconstruction of its own decision in Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002), in order to find that Johnson did not mean what it plainly said, i.e., (1) that a jury must find that mitigation does not outweigh statutory aggravating circumstances, and (2) that the aforementioned finding must be made beyond a reasonable doubt. Compare Johnson, 118 Nev. at 802-03, 59 P.3d at 460, with Nunnery, 127 Nev. at 772-73, 263 P.3d at 251. Moreover, Nunnery's discussion of legislative intent is also misplaced because the Sixth Amendment can apply in situations where the Legislature does not intend for it to apply. Compare Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000), with Nunnery, 127 Nev. at 774, 263 P.3d at 252. Finally, as explained above, this Court cannot rely upon other state capital sentencing schemes where

the weighing determination is part of the selection phase of a capital sentencing proceeding rather than part of the eligibility phase as it is in Nevada.

The High Court's intervening decision in Hurst also requires reconsideration of this Court's ruling that Middleton's claim is procedurally defaulted. The legal unavailability of Middleton's claim at the time he filed the instant petition combined with the recent decision of the United States Supreme Court in Hurst establishes cause-and-prejudice to overcome the procedural default rules that this Court imposed. See, e.g., Evans v. State, 117 Nev. 609, 643, 28 P.3d 498, 521 (2001) (cause to overcome state procedural defaults exists when federal courts have ruled "contrary to this court's earlier decision"); Lozada v. State, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994); cf. Reed v. Ross, 468 U.S. 1, 15-19 (1984) (novelty of constitutional issue affecting the allocation of the burden of proof at petitioner's trial established cause to overcome state procedural default). Middleton can therefore show cause under Lozada and Evans to overcome any procedural default of his Sixth Amendment claim due to its legal unavailability in prior proceedings.

See, e.g., Bejarano v. State, 122 Nev. 1066, 1071, 146 P.3d 265, 269 (2006) (petitioner "demonstrated good cause for failing to raise [ ] claim earlier" when "decision was not reasonably available").

Finally, Hurst must be retroactively applied to Middleton because the constitutional standard of proof beyond a reasonable doubt is a substantive accuracy-enhancing rule that is critical to making a reliable determination of death eligibility. The High Court has long recognized that the reasonable doubt standard of proof must be applied retroactively as a matter of federal law. Ivan V. v. New York, 407 U.S. 203, 204-05 (1972); Hankerson v. North Carolina, 432 U.S. 233, 243-44 (1977). Consistent with this position, the Delaware Supreme Court has held that Hurst's burden of proof requirement relating to the weighing determination must be applied retroactively to all habeas petitioners regardless of when their cases were final. Powell v. Delaware, __ A.3d __, 2016 WL 7243546, at *5 (Del. December 15, 2016). This Court must apply Hurst to Middleton, because Nevada purportedly has a more favorable retroactivity standard than the one that exists under federal law which was applied in Powell. Colwell v. State, 118 Nev. 807, 818-20, 59 P.3d

463, 471-72 (2002). The reasonable doubt standard is substantive in nature because it excludes certain individuals from a guilty verdict who would otherwise be found guilty based on a lesser standard of proof. Cf. Bejarano, 122 Nev. at 1076, 146 P.3d at 272-73 (noting substantive rules are "an exception to the nonretroactivity of procedural rules").[3] Even if it were only considered procedural in nature, the reasonable doubt standard would still have to be applied retroactively because "accuracy is seriously diminished without the rule." Colwell, 118 Nev. at 1076-77, 59 P.3d at 472-73.

This Court must therefore grant rehearing and vacate Middleton's death sentences in light of Hurst.

### B. Rehearing is Required Because the Court Overlooked Material Facts and Controlling Legal Authority Precluding the State from Relying on the Laches Bar of NRS 34.800(1)(b)

Rehearing is required because this Court overlooked Middleton's arguments that the laches bar of NRS 34.800 could not be applied to him

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[3] Substantive rules must be applied retroactively under the Supremacy Clause of Article VI of the United States Constitution. Montgomery v. Louisiana, 136 S. Ct. 718, 728-29 (2016).

to bar consideration of his claims of ineffective assistance of first state post-conviction counsel. In its decision, this Court simply applied the laches bar to Middleton without addressing any of his arguments. Slip. Op. at 24 n.13.

This Court overlooked material issues of law and fact preventing it from barring Middleton's claims under laches. As a matter of law, intervening authority from this Court holds that Middleton has one year from the finality of the first state post-conviction proceeding in which to file a successive petition challenging first state post-conviction counsel's ineffectiveness. Rippo v. State, 132 Nev. __, 368 P.3d 729, 739-40 (2016). In Rippo, this Court rejected the State's request to create a shorter time period because "it would only add to the already endless litigation over the application of the procedural default rules, rules that are supposed to discourage the perpetual filing of habeas petitions." Id. at 739. In light of the State's failure to plead specific allegations of prejudice under NRS 34.800(1)(b), it was improper for this Court to impose the laches bar, as there must be "[e]specially strong circumstances [] to sustain the defense of laches when the statute of limitations has not run." Langir v. Arden,

82 Nev. 28, 36, 409 P.2d 891, 895 (1966). Reconsideration of this Court's decision is therefore required under Rippo.

As a factual matter, this Court overlooked the fact that the laches bar was triggered before the state post-conviction attorneys who ultimately represented Middleton were even appointed to represent him. In light of the State's acknowledgment that "Middleton was indeed entitled to the effective assistance of post-conviction counsel," Answering Brief at 9, it follows that this Court erred in applying laches to bar him from vindicating that right, as "the law does not require a person to do an impossible thing." First Nat. Bank v. Meyers, 40 Nev. 284, 292, 161 P. 929, 931 (1916) (citation omitted). This Court failed to acknowledge that the delay in Middleton's first state post-conviction proceeding was a result of actions by the State, this Court, and his own counsel – whose performance was so poor that it caused the Court to remove counsel from the case and remand for the re-initiation of the habeas proceedings. Middleton v. Warden, 120 Nev. 664, 98 P.3d 694 (2004). In similar circumstances, this Court has held that the State cannot invoke laches because "[t]he record indicates [the petitioner] has not inappropriately

delayed this case." State v. Powell, 122 Nev. 751, 758-59, 138 P.3d 453, 457 (2006). This Court's arbitrary failure to apply this controlling authority to Middleton demands reconsideration.

### C. Rehearing is Required to Address the Constitutional Violations Caused by the Washoe County District Attorney's Office's Involvement in the Instant Habeas Corpus Proceeding and in any Future Proceedings

Finally, rehearing is required because this Court overlooked Middleton's arguments that the Washoe County District Attorney's Office's ("WCDA") involvement in the instant habeas proceeding and in any potential future prosecutions violated (and violates) his federal constitutional rights to counsel and to due process. In its order, dated February 27, 2015, this Court disqualified DDA Joseph Plater from representing the State in this appeal due to his receipt of privileged information from Middleton as a defense attorney. Slip. Op. at 4. However, this Court refused to disqualify the WCDA from the case because Middleton could not prove that Plater shared privileged information with other people in the office. Id. at 4-5. Contra NRPC 1.18(c); Ryan's Express Transp. Serv. v. Amador Stage Lines, Inc., 128

Nev. __, 279 P.3d 166, 170 n.2 (2012) (party seeking to resist imputed disqualification must overcome presumption of shared confidences).

Middleton argued in his supplemental brief requesting disqualification, in his reply brief, and in his motion for remand, that imputed disqualification of the WCDA was constitutionally-required due to the violation of his rights to counsel and to due process. See United States v. Schell, 775 F.2d 559, 565-66 (4th Cir. 1985); United States v. Marshank, 777 S. Supp. 1507, 1521 (N.D. Cal. 1991).[4] He also argued that the order under review by the Court was fatally defective because it was authored in material part by Plater. Cf. Jefferson v. Upton, 560 U.S. 284, 292-94 (2010) (per curiam). Middleton argued he was entitled to an evidentiary hearing to determine whether an adequate ethical screen had been created. See Ryan's Express Transp. Serv., 279 P.3d at 171-72. He also argued that disqualification of the WCDA from the case, the re-initiation of the habeas proceedings with a special prosecutor, and an

[4] To the extent this Court denied Middleton's motion for remand because he sought to "enlarge the record," slip. op. at 26 n14, Middleton notes that a remand for an evidentiary hearing to determine whether the WCDA has created a sufficient ethical screen is expressly permitted by Ryan's Express. See 279 P.3d at 172.

order enjoining the WCDA from further any involvement in any future proceedings involving Middleton was a remedy properly tailored to address the constitutional violations that have occurred (and continue to occur) in this case. Rehearing is required for this Court to address these issues.

DATED this 30th day of January, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

*/s/ David Anthony*
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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 Professional Plus 2013 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 2,852 words.

DATED this 30th day of January, 2017.

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 30th day of January 2017, electronic service of the foregoing Petition for Rehearing shall be made in accordance with the Master Service List as follows:

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*/s/ Jeremy Kip*
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## SUPPLEMENTAL APPENDIX D

**Response to Petition for Rehearing, Middleton v. Filson, Nevada Supreme Court, Case No. 62869 (April 5, 2017)**

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

DAVID STEPHEN MIDDLETON,

Appellant,

v.

TIMOTHY FILSON, Warden; and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

_____/

Case. No. 62869

(Death Penalty Habeas Corpus Case)

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Clerk of Supreme Court

**RESPONSE TO PETITION FOR REHEARING**

This cause is before the Court upon a petition for rehearing. This is an appeal from an order denying a post-conviction petition for writ of habeas corpus. The petition was dismissed in the district court as untimely, abusive and successive. Middleton appealed and this Court affirmed the order dismissing. The Court ruled that the petition was not time-barred, but that dismissal was still appropriate. *Middleton v. Warden*, 2016 WL 7407431 (2016). Middleton later petitioned for rehearing and this Court has ordered a response to that petition.

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Docket 62869 Document 2017-11342

## A. *Hurst* has no application in Nevada.

The petition for rehearing is based on the proposition that *Hurst v. Florida*, 136 S.Ct. 616 (2016) has some bearing on this case. It does not. The primary reason is that there has been no litigation in the district court based on that decision, and therefore no ruling in the district court or in this Court. There is, however, no reason to let it go until the next petition, because there is no merit to the argument.

*Hurst v. Florida, supra*, concerned a Florida procedure by which a jury in a death penalty case merely made a sentencing recommendation but the trial court judge was free to reject that recommendation and impose the death sentence. The Supreme Court held only that prior decisions, such as *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), require that factual findings that change the range of sentences available to the sentencing body, be made by a jury. To the extent that Middleton claims that the High Court ruled that the weighing process, the subjective determination of whether to impose the death sentence, must be decided by some objective standard, there was no such ruling in the *Hurst* decision. It just ain't there.

As this Court ruled in *Nunnery v. State*, 127 Nev. 749, 771, 263 P.3d 235, 250 (2011), the weighing of aggravating and mitigating circumstances is a moral decision, not susceptible to proof (or being disproved). There is

no evaluation, for example, of the sufficiency of the evidence supporting the relative weight of the two because no evidence is necessary beyond the evidence showing the existence of the aggravating and mitigating circumstances. Surely Nevada law requires that the aggravating circumstances must be proved beyond a reasonable doubt, as it was in this case, and surely Nevada law requires that the jury must decide whether the aggravators have been proved by that standard, as they did in this case, but the suggestion that there must be some further finding of fact is unsupported by *Hurst*, or *Nunnery*, or any other decision by any authoritative court.

To put it more simply: the decision in *Hurst* came about because the jury's role was simply advisory and the judge made the necessary factual determinations. That need not interest this Court because in Nevada, the jury's role is not advisory and the judge has no authority to impose a sentence greater than that imposed by the jury.

*Hurst* does not stray beyond a mere application of *Ring* and as such says nothing about the selection phase or the burden of proof applicable to the selection phase. *Hurst* set out the statutory prerequisites for imposing a sentence of death and noted that Florida law required that those findings be made by a judge. *Hurst*, 577 U.S. at ___, 136 S.Ct. at 622. The Court

pointed out that the role of the jury under Florida law was advisory only. *Id.* *Hurst* ruled that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 577 U.S. at ___, 136 S.Ct. at 621-22. The entirety of the United States Supreme Court's discussion in *Hurst* focused on applying *Ring* to the case before it. *Id.* The Court ended by concluding:

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

*Id.* at ___, 136 S.Ct. at 622.

*Hurst* simply does not stand for the propositions Petitioner attributes to it. Indeed, the Court specifically limited the scope of *Hurst* to aggravating circumstances when setting out the actual holding:

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

*Id.* at ___, 136 S.Ct. at 624 (emphasis added). Even the order allowing the review limited the issue to the application of *Ring*. *See* 135 S.Ct. 1531.

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Because Nevada procedure is grossly different than that of Florida, this Court should determine that *Hurst, supra*, has no application in Nevada beyond that already acknowledged in *Nunnery, supra*.

**B. Laches.**

The petition for rehearing goes on at some length about laches and the assertion that the petition was timely filed. This Court agreed, twice, in *Middleton v. Warden, supra*. The Court ruled that the petition was filed in a timely manner both under NRS 34.726 and in considering laches. If the Court wishes to reconsider and rule that the petition was not timely, the State has no objection.

**C. The Conflict.**

The petition for rehearing rehashes the arguments concerning the involvement of Deputy District Attorney Joe Plater. This was thoroughly argued and rejected before the briefing in this case and the petition for rehearing raises nothing new. NRAP 40 does not allow the repeated presentation of the same argument. To the extent that Middleton claims that he should be allowed remand to try to prove that Mr. Plater received and transmitted confidential information, we already had that hearing and there was a failure of proof. This Court disqualified Mr. Plater, but not the

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entire office of the Washoe County District Attorney. There is no need for a further hearing.

**CONCLUSION**

The decision by this Court was correct and complete and the intervening decision of *Hurst v. Florida* has no application in Nevada. Accordingly, the petition for rehearing should be denied.

DATED: April 5, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia 14.

2. I further certify that this response complies with the page limitations of NRAP 40(b)(3) because, it does not exceed 10 pages.

DATED: April 5, 2017.

CHRISTOPHER J. HICKS
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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Second Judicial District Court on April 5, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

David Anthony
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/s/ DESTINEE ALLEN
DESTINEE ALLEN