No. ________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

RALPH JEREMIAS, Petitioner,

v.

THE STATE OF NEVADA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JONELL THOMAS
(Counsel of Record)
OFFICE OF THE CLARK COUNTY
SPECIAL PUBLIC DEFENDER
330 South Third Street
Suite 800
Las Vegas, NV 89155
(702) 455-6265
thomasjn@ClarkCountyNV.gov
Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution requires – in a state in which a jury is required to find that mitigating circumstances do not outweigh the aggravating circumstances to impose death – that this finding be made beyond a reasonable doubt.

2. Whether the Confrontation Clause applies to evidence offered by the prosecution to prove a statutory aggravating circumstance that establishes a defendant's eligibility for the death penalty.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW. 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED. 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE PETITION 7

I. This Court Should Resolve an Important Constitutional Issue, Which Is the Subject of Of Dispute Between the Lower Courts, as to Whether the Weighing of Aggravating and Mitigating Circumstances must Be Made Under the Beyond a Reasonable Doubt Standard under Hurst V. Florida 7

II. The Confrontation Clause Should Apply To The Jury's Eligibility Determination In A Capital Case 23

CONCLUSION. 36

APPENDIX A:
Jeremias v. State,
412 P.3d 43 (Nev. 2018) 1a-13a

APPENDIX B:
Order Denying Rehearing (unpublished)
(Nevada Supreme Court) 14a-15a

APPENDIX C:
Summers v. State,
148 P.3d 778 (Nev. 2006) 16a-32a

TABLE OF AUTHORITIES

PAGE(S)

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) . . . . passim

Blakely v. Washington,
542 U.S. 296 (2004) 20

Brice v. State,
815 A.2d 314 (Del. 2003) 8, 17

Browning v. State,
188 P.3d 60 (Nev. 2008) 24

Bruton v. United States,
391 U.S. 123 (1968) 30, 31

Buchanan v. Angelone,
522 U.S. 269 (1998) 34

Bullington v. Missouri,
451 U.S. 430 (1981) 28, 32, 34, 35

Burnside v. State,
352 P.3d 627 (Nev. 2015) 24

Caldwell v. Mississippi,
472 U.S. 320 (1985) 35

California v. Green,
399 U.S. 149 (1970) 29

Crawford v. Washington,
541 U.S. 36 (2004) . . . . passim

Cunningham v. California,
549 U.S. 270 (2007). 20, 22

Estelle v. Smith,
451 U.S. 454 (1981) . . . 28, 32

Ex Parte Bohannon,
222 So.3d 525 (Ala. 2016) . . . 11

Ex Parte Waldrop,
859 So.2d 1181 (Ala. 2002) . . . 17

Gardner v. Florida,
430 U.S. 349 (1977) . . . 35

Hurst v. Florida,
136 S.Ct. 616 (2016) . . . passim

Hurst v. State,
202 So.3d 40 (Fla. 2016) . . . 8

In re Winship,
397 U.S. 358 (1970) . . . 21

Jeremias v. State,
412 P.3d 43 (Nev. 2018) . . . 32

Kansas v. Carr,
136 S.Ct. 633 (2016) . . . 6, 22, 23, 26

Kasten v. Saint-Gobain Performance Plastics Corp.,
563 U.S. 1 (2011) . . . 19

Lockett v. Ohio,
438 U.S. 586 (1978) . . . 29, 35

Lord v. State,
806 P.2d 548 (Nev. 1991) . . . 30, 31

Lowenfield v. Phelps,
484 U.S. 231 (1988) . . . 33

Maestas v. State,
275 P.3d 74 (Nev. 2012) . . . 24

Mattox v. United States,
156 U.S. 237 (1895) 35

Monge v. California,
524 U.S. 721 (1998) 35

Morgan v. Illinois,
504 U.S. 719 (1992) 33

Muhammad v. Sec'y, Fla. Dep't of Corr.,
733 F.3d 1065 (11th Cir. 2013) 25, 28

Muhammad v. Tucker,
905 F. Supp. 2d 1281 (S.D. Fla. 2012) 28

Nunnery v. State,
263 P.3d 235 (Nev. 2011) 6, 17

Oken v. State,
835 A.2d 1105 (Md. 2003) 17

People v. Aranda,
407 P.2d 265 (Cal. 1965) 30

Pitchford v. State,
45 So. 3d 216 (Miss. 2010) 26, 27

Pointer v. Texas,
380 U.S. 400 (1965) 24, 33

Rauf v. State,
145 A.3d 430 (Del. 2016) 8, 9, 17, 18

Ring v. Arizona,
536 U.S. 584 (2002) . . . . passim

Rodgers v. State,
948 So. 2d 655 (Fla. 2006) 26

Russeau v. State,
171 S.W.3d 871 (Tex. Crim. App. 2005) 26

Simmons v. South Carolina,
512 U.S. 154 (1994) 28

Sivak v. State,
731 P.2d 192 (Idaho 1986). 25

Specht v. Patterson,
386 U.S. 605 (1967) 27, 34, 35

State v. Bell,
603 S.E.2d 93 (N.C. 2004) 26

State v. Carr,
331 P.3d 544 (Kan. 2014) 26

State v. Dunlap,
313 P.3d 1 (Idaho 2013). 25

State v. Maestas,
299 P.3d 892 (Utah 2012) 28

State v. Mason,
2018 Ohio Lexis 854, *P10, *P29 (Ohio 4/18/2018) 11

State v. McGill,
140 P.3d 930 (Ariz. 2006) 26

State v. Nobles,
584 S.E.2d 765 (N.C. 2003) 26

State v. Robinson,
796 P.2d 853 (Ariz. 1990) 26

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003) 10

State v. Williams,
690 S.W.2d 517 (Tenn. 1985) 30

Sullivan v. Louisiana,
508 U.S. 275 (1993) 21

Summers v. State,
148 P.3d 778 (Nev. 2006) . . . . passim

Turner v. Murray,
476 U.S. 28 (1986) 28

Underwood v. Royal,
2018 U.S. App. Lexis 18016 (10th Cir. 6/2/2018) 12

United States v. Booker,
543 U.S. 220 (2005) 15, 22

United States v. Con-Ui,
2017 WL 1393485, 2017 U.S. Dist. Lexis 58873 (M.D. Pa. 2017) 11

United States v. Concepcion Sablan,
555 F. Supp. 2d 1205 (D. Colo. 2007) 27

United States v. Fields,
483 F.3d 313 (5th Cir. 2007) 25

United States v. Gaudin,
515 U.S. 506 (1995) 23

United States v. Jordan,
357 F. Supp. 2d 889 (E.D. Va. 2005). 27

United States v. Mills,
446 F. Supp. 2d 1115 (C.D. Cal. 2006) 27

United States v. Roof,
225 F.Supp.3d 413 (D. S.C. 2016) 12

United States v. Runyon,
707 F.3d 475 (4th Cir. 2013). 12

United States v. Umaña,
750 F.3d 320 (4th Cir. 2014) 26, 27

Walton v. State,
481 So.2d 1197 (Fla. 1986) 30

Williams v. New York,
337 U.S. 241 (1949) 24, 27, 34

Woldt v. People,
64 P.3d 256 (Colo. 2003) 10

Woodward v. Alabama,
134 S.Ct. 405 (2013) 10

Zant v. Stephens,
462 U.S. 862 (1983) 23

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

11 Del.C § 4209 9

28 U.S.C. § 1257(a) 1

Fla. Stat. § 921.141(3) 17

Nev. Rev. Stat. § 175.554 . . . . 3, 16, 17

Nev. Rev. Stat. § 200.030 . . . . 3, 16, 17

Ohio R.C. 2929.03 (D)(1) 12

Sup. Ct. Rule 10(b) 12

Sup. Ct. Rule 10(c) 7, 12

U.S. Const. Amend. V 2, 16, 21, 22

U.S. Const. Amend. VI . . . . passim

U.S. Const. Amend VIII 2, 22, 23

U.S. Const. Amend XIV 2, 12, 21

OTHER AUTHORITIES

3 William Blackstone,
Commentaries on the Laws of England
*373 (1768). 36

Matthew Hale,
History and Analysis of the Common Law of England
258 (1713) 36

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ralph Jeremias respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada on direct appeal in a death penalty case.

OPINION BELOW

The decision of the Supreme Court of Nevada, affirming petitioner's conviction and his two sentences of death is reported at Jeremias v. State, 412 P.3d 43 (Nev. 2018). It is reprinted in the Appendix to the Petition ("Pet. App.") at page 1a-13a. The order denying rehearing is unpublished and is reprinted in the Appendix at Pet. App. 14a-15a.

BASIS FOR JURISDICTION

The final decision of the Nevada Supreme Court was filed on March 1, 2018. Pet. App. 1a. A timely petition for rehearing was filed on March 13, 2018. That petition was denied on April 27, 2018. Pet. App. 14a.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be... deprived of life, liberty, or property without due process of law..."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...; [and] to be confronted with the witnesses against him; ..."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS INVOLVED

Nevada Revised Statutes § 175.554 provides in pertinent part:

2. The jury shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.

3. The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Nevada Revised Statutes § 200.030 provides in pertinent part:

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances . . . .; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

STATEMENT OF THE CASE

This case presents two recurring and consequential issues in capital cases that divide the federal courts of appeal and state courts of last resort. The first question is

whether the State must prove beyond a reasonable doubt that mitigating circumstances do not outweigh aggravating circumstances where that decision determines whether a defendant may be sentenced to death. The second question is whether the Confrontation Clause applies to evidence offered by the prosecution, including a transcript of a non-testifying co-defendant's interrogation to detectives, to prove a statutory aggravating circumstance establishing a defendant's eligibility for the death penalty.

A. Factual Background

Petitioner Ralph Jeremias was charged with two counts of first degree murder and other offenses in Clark County, Nevada. Pet. App. 2a. The State's theory was that on June 8, 2009, Mr. Jeremias shot Brian Hudson and Paul Stephens as part of a robbery scheme by Mr. Jeremias, Carlos Zapata, and Ivan Rios. Pet. App. 2a. The trials of the three men were severed. Mr. Zapata entered a plea and agreed to testify against his co-defendants. Pet. App. 2a. Mr. Rios was acquitted of the charges. Pet. App. 2a, fn. 1.

The State of Nevada noticed its intent to seek the death penalty against Mr. Jeremias. Following a jury trial, in which Mr. Jeremias testified that he stole items belonging to Mr. Hudson and Mr. Stephens after finding them deceased in their apartment but did not kill them, the jury found Mr. Jeremias guilty and a penalty proceeding commenced before the jury. Pet. App. 2a-3a. The jury found aggravating circumstances of murders committed in the course of a robbery, murders committed to prevent a lawful arrest, and conviction for more than one count of murder. Pet. App.

3a. The jury also found 19 mitigating circumstances. 14 ROA 3080; 15 ROA 3081-83, 3089-90. The mitigation included childhood trauma due to separation from his parents, brain damage, untreated anxiety, mental health issues, and the jurors found that Mr. Jeremias was under the influence of controlled substances at the time of the offense. Pet. App. 3a; 15 ROA 3082-83, 3090. The jury returned verdicts of death for both counts of first degree murder. Pet. App. 3a.

B. The Nevada Supreme Court's Decision

Mr. Jeremias filed a timely notice of appeal to the Nevada Supreme Court. Following briefing and oral argument, including supplemental brief addressing this Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016), the Nevada Supreme Court entered a published opinion affirming Mr. Jeremias's conviction and sentences of death. Pet. App. 1a-2a. Several issues were raised concerning his conviction and death sentences, including claims that the sentences of death were unconstitutional because the jury was not instructed that it needed to find beyond a reasonable doubt that mitigating circumstances did not outweigh aggravating circumstances in order to impose a sentence of death, and because the jury was allowed to consider testimonial hearsay evidence during the penalty phase of the trial in its consideration of aggravating circumstances, the weighing of aggravating and mitigating circumstances, and other matter evidence in reaching its decision concerning the sentence to be imposed.

Mr. Jeremias contended that the instruction regarding the weighing of aggravating and mitigating circumstances was unconstitutional because it did not

specify that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt. The Nevada Supreme Court had previously rejected this challenge in Nunnery v. State, 263 P.3d 235, 250 (Nev. 2011), but the issue was considered again based upon this Court's decision in Hurst v. Florida, 136 S.Ct. 616 (2016). Pet. App. 10a. The Court rejected Mr. Jeremias's challenge, found that Hurst did nothing more than apply Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000), to Florida's death penalty procedure, and concluded that Hurst did not pronounce a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond a reasonable burden of proof standard. Pet. App. 10a. The Nevada Supreme Court also concluded that this Court's opinion in Kansas v. Carr, 136 S.Ct. 633, 642 (2016), supported the finding that the weighing process is an inherently moral question, which could not be reduced to a cold, hard factual determination. Pet. App. 11a.

Mr. Jeremias contended that his Sixth Amendment rights, as explained in Crawford v. Washington, 541 U.S. 36 (2004), were violated by the introduction of testimonial hearsay evidence, including a transcript of the interrogation of his co-defendant Ivan Rios, who did not testify at Mr. Jeremias's trial, and police reports and other evidence offered in support of the aggravating circumstance of robbery and aggravating "other matter" evidence. In its opinion, the Nevada Supreme summarily concluded that the issue involving Mr. Rios's testimony was not adequately preserved at trial and was not plain error. Pet. App. 9a. The Court did not address the additional Confrontation Clause issues in the opinion, but on rehearing the Court stated that it

considered and rejected the claim based upon its decision in Summers v. State, 148 P.3d 778 (Nev. 2006), in which it held that Crawford v. Washington, 541 U.S. 36 (2004), does not apply to evidence admitted during a capital penalty trial. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve an important constitutional issue, which is the subject of dispute between the lower courts, as to whether the weighing of aggravating and mitigating circumstances must be made under the beyond a reasonable doubt standard under Hurst v. Florida.

This case presents this Court with the opportunity to address an important constitutional issue which has divided the lower courts. The Supreme Court of Nevada held that the weighing of aggravating and mitigating circumstances is not subject to a jury determination under the proof beyond a reasonable doubt burden of proof. Mr. Jeremias, who faces the death penalty because of this decision, respectfully submits that the Nevada Supreme Court is wrong and that Hurst v. Florida, 136 S.Ct. 616 (2016), compels the contrary conclusion. This is an important federal question which involves the framework in which a capital jury makes its decision about the ultimate penalty. This Court's resolution of this issue is critical. Sup. Ct. Rule 10(c).

A. The Lower Courts Are Split On Application of Hurst to Death Penalty Weighing Determinations

Although Hurst v. Florida is a relatively recent decision, numerous courts have issued decisions concerning its application to the weighing determination in capital cases. Some courts have disagreed with the Nevada Supreme Court's approach and have held that Hurst applies to the weighing determination.

On remand following this Court's decision in Hurst, the Florida Supreme Court acknowledged Hurst's broad scope. The Court held that the Sixth Amendment's protections extended to all findings of fact incorporated into Florida's statute, including the findings that aggravating circumstances are sufficient for a death sentence and that they outweigh the mitigating circumstances. Hurst v. State, 202 So.3d 40 (Fla. 2016). In so holding, the Florida Supreme Court explicitly rejected the state's argument that Hurst v. Florida "only requires that the jury unanimously find the existence of one aggravating factor and nothing more." Id. at 53 & n.7. The Court noted,

> "Hurst v. Florida made clear that the jury must find 'each fact necessary to impose a sentence of death,' 136 S.Ct. at 619, 'any fact that expose[s] the defendant to a greater punishment,' Id. at 621, 'the facts necessary to sentence a defendant to death,' Id., 'the facts behind' the punishment, Id., and 'the critical findings necessary to impose the death penalty,' Id. at 622 (emphasis added)."

Hurst, 202 So. at 53 n.7. Because Florida law required a finding that aggravating circumstances were sufficient for a death sentence and that they outweighed mitigating circumstances, those determinations were also within the Sixth Amendment's scope. Id.

Following this Court's decision in Hurst, the Delaware Supreme Court also struck down its state's death penalty statute as inconsistent with the Sixth Amendment. Rauf v. State, 145 A.3d 430, 433-34 (Del. 2016) (Per Curiam opinion). In doing so, the Court overruled its prior decision, issued following Ring v. Arizona, that the same statutory scheme was constitutional. Id. at 486 (Holland, J., concurring) (noting overruling of Brice v. State, 815 A.2d 314 (Del. 2003)). Delaware's now-defunct

capital punishment statute hadassigned a factfinding role in capital sentencing to a judge, rather than a jury. 11 Del.C. § 4209. Upon a conviction of first-degree murder, the jury unanimously determined, beyond a reasonable doubt, the presence of an aggravating circumstance. Id. Once it did so, however, the court alone made additional factual findings authorizing a death sentence. Id. The statute provided,

> the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

Id.

The Delaware Supreme Court found this provision, which assigned these determinations to a judge, rather than a jury, violated the Sixth Amendment. Rauf, 145 So.3d at 433-34. Specifically, with respect to the relative weight of aggravating and mitigating circumstances, the Court observed:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

Rauf, 145 So.3d at 485 (Holland, J., concurring). Therefore, the Court concluded that

this determination, like the finding of a statutory aggravating circumstance, must be made by the jury, beyond a reasonable doubt. Id. at 434, 488.

Other courts are in accord based upon pre-Hurst decisions. See State v. Whitfield, 107 S.W.3d 253, 257-58 (Mo. 2003) (en banc) (holding that the rule of Ring applied to all factual prerequisites for a death sentence, including (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation.); Woldt v. People, 64 P.3d 256, 266 (Colo. 2003) (en banc) (Sixth Amendment protections extend to all factual findings on which a death sentence is predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved").

Justice Sotomayor, dissenting from the denial of certiorari in Woodward v. Alabama, 134 S.Ct. 405 (2013), made an analogous observation. Woodward involved a challenge to Alabama's capital punishment scheme, which allows judges to independently weigh aggravating and mitigating circumstances and impose death sentences, even where a jury has recommended a sentence of life in prison. Id. at 406. Justice Sotomayor acknowledged,

> The very principles that animated our decisions in Apprendi and Ring call into doubt the validity of Alabama's capital sentencing scheme. Alabama permits a defendant to present mitigating circumstances that weigh against imposition of the death penalty. See Ala.Code §§ 13A–5–51, 13A–5–52. Indeed, we have long held that a defendant has a constitutional right to present mitigating evidence in capital cases. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). And a defendant is

> eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. See Ala.Code §§ 13A–5–46(e), 13A–5–47(e). The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive death, as opposed to life without parole. Under Apprendi and Ring, a finding that has such an effect must be made by a jury.

Id. at 410-11.

Other courts, in contrast, are in agreement with the Nevada Supreme Court. The Alabama Supreme Court held in *Ex Parte Bohannon*, 222 So.3d 525 (Ala. 2016), that under *Hurst,* the Sixth Amendment only required jury determination of an aggravating circumstance:

> "*Hurst* focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*; consequently, no reason exists to disturb our decision in *Ex parte Waldrop* [859 So.2d 1181 (Ala. 2002)] with regard to the weighing process."

Id. at 533.

In United States v. Con-Ui, 2017 WL 1393485, 2017 U.S. Dist. Lexis 58873 (M.D. Pa. 2017), a federal district court judge concluded that facts, or elements, are prerequisites to the imposition of the death penalty during the guilt and eligibility phases of a capital trial, but the weighing of aggravating and mitigating circumstances is part of the selection phase and are not subject to Hurst. Id. at *7-13.[1] Likewise, in

[1]Other courts take a third approach, which finds that the Sixth Amendment applies to only the eligibility determination of whether aggravating circumstances exist, but find that the weighing of mitigating and aggravating circumstances is to be determined under a beyond a reasonable doubt standard as a matter of state law. See e.g. *State v. Mason*, 2018 Ohio Lexis 854, *P10, *P29 (Ohio 4/18/2018) (finding that weighing is not a fact finding process subject to the Sixth Amendment, but Ohio provides the right to a jury trial

Underwood v. Royal, 2018 U.S. App. Lexis 18016 (10th Cir. 6/2/2018), the Tenth Circuit held, in the context of a federal habeas corpus proceeding, that this Court's opinion in Hurst "did not address whether the second of the required findings – that mitigating circumstances do not outweigh the aggravating circumstances – is also subject to Apprendi's rule." Id. at *63-64, 66. See also Id. at *66-67. In United States v. Roof, 225 F.Supp.3d 413, 419 (D. S.C. 2016), a federal district court held that Hurst did not warrant revisiting Fourth Circuit authority holding that the penalty phase jury need not find that aggravating factors sufficiently outweigh mitigating factors beyond a reasonable doubt) (citing United States v. Runyon, 707 F.3d 475, 515-16 (4th Cir. 2013)).

Mr. Jeremias respectfully submits that certiorari should be granted to resolve this conflict between the lower courts as to the application of Hurst to the weighing determination of capital cases. This is an important constitutional issue which warrants this Court's consideration under Rules 10(b) and 10(c).

B. The Nevada death penalty scheme conflicts with Hurst v. Florida.

The Nevada capital sentencing statute, as interpreted by the Nevada Supreme Court, permits a jury to make factual findings justifying a death sentence in the absence of proof beyond a reasonable doubt, in violation of the Sixth and Fourteenth Amendments.

---

during the penalty phase and the state "must prove beyond a reasonable doubt that 'the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.") (quoting R.C. 2929.03(D)(1)).

In an uninterrupted series of decisions spanning more than fifteen years, this Court has vigorously and consistently repeated a basic, bright-line rule mandated by the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." Hurst v. Florida, 136 S.Ct. 616, 621 (2016), quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000). In Hurst, this Court recently restated this foundational principle, emphasizing that it applies with equal force to death-penalty sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619.

Hurst, however, did more than simply reiterate the principles established in Apprendi and Ring. It also clarified for the first time that, where the weighing of facts in aggravation and mitigation is a precursor to a death sentence, the Sixth Amendment requires the State to prove this element to a jury, beyond a reasonable doubt. 136 S. Ct. at 621- 22. In Hurst, the State of Florida attempted to argue that the weighing process did not fall within the ambit of Ring and Apprendi, because the defendant was already eligible for a death sentence once the jury implicitly found "at least one aggravating circumstance beyond a reasonable doubt." 136 S. Ct. at 622. This Court rejected that claim, noting that determinations regarding the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances were also factual findings necessary to Hurst's eligibility for a death sentence. Id.

While Nevada law provides for a jury determination of the relative weight of aggravating and mitigating circumstances, the jury's mere involvement in capital sentencing, standing alone, does not satisfy the Sixth Amendment. A jury "finding" only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens") (emphasis in original). Hurst resolved any lingering douts arising under Apprendi and Ring that Nevada's death penalty statute - which makes a death sentence contingent on a jury finding "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found," - violates constitutional tenets.

1. Under the Sixth Amendment to the United States Constitution, all facts supporting an enhanced or increased sentence, including the relative weight of aggravating and mitigating circumstances, are "elements" of the crime

It is now incontrovertible that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Where a factual finding is a necessary precursor to an enhanced or increased sentence, such as a death sentence, any distinction between "elements" of the crime and "sentencing factors" is dissolved. Id. Apprendi's unbending rule has, therefore, invalidated schemes involving sentencing

enhancements, 530 U.S. at 490, mandatory sentencing guidelines, United States v. Booker, 543 U.S. 220, 226 (2005), and the death penalty, Ring v. Arizona, 536 U.S. 584, 589 (2002).

Apprendi applies to all findings of fact necessary to the imposition of an increased sentence under state or federal law. This fundamental right is no less protective in death penalty cases. Ring, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). In Hurst, this Court clearly stated, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Hurst, 136 S.Ct. at 619 (emphasis added). In so holding, this Court noted that multiple factual findings were necessary to establish a defendant's death-eligibility in Florida, including a determination of the relative weight of aggravating and mitigating circumstances:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [State v.] Steele, 921 So.2d [538,] 546 [(Fla. 2005)].

Id. (emphasis in original). Therefore, whether there are sufficient aggravators to justify a death sentence and the relative weight of aggravating factors and mitigating circumstances are both factual findings encompassed within Apprendi's rule. Hurst illustrates, that, in a weighing scheme like Florida's or Nevada's, the protections of

Apprendi and Ring extend to all factual determinations implicit in capital sentencing, including those regarding the relative weight of aggravating and mitigating circumstances.

2. The Nevada death penalty statute, under which a jury may impose a sentence of death based on facts that have not been established beyond a reasonable doubt, violates the Fifth and Sixth Amendments

Like the provisions in Florida and Delaware, the Nevada death penalty sentencing scheme violates the Fifth and Sixth Amendments insofar as it has been interpreted not to require the State to prove beyond a reasonable doubt that mitigating circumstances do not outweigh the aggravating. The statute provides that, after the jury has found the defendant guilty of first-degree murder and determined that a statutory aggravating circumstance exists beyond a reasonable doubt, the same jury must make additional findings prior to imposing a death sentence: "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." Nev. Rev. Stat. § 175.554. See also, Nev. Rev. Stat. § 200.030(4).

The rule of Ring and Hurst reveals that, because it is a necessary factum prerequisite to a death sentencing that the additional finding that one or more aggravating circumstances outweigh or equal all the mitigating circumstances, it must be established beyond a reasonable doubt. Hurst, 136 S.Ct. at 619, 622. The Nevada legislature did not make a death sentence permissible simply upon the jury's

determination that an aggravating factor exists. See Nev. Rev. Stat. § 175.554; Nev. Rev. Stat. § 200.030(4). Rather, it chose to make these additional findings statutorily necessary to the imposition of a death sentence. Id. Therefore, under Apprendi and its progeny, they are elements of the crime of capital murder that must be proven to a jury, beyond a reasonable doubt. See Hurst, 126 S.Ct. at 622; Apprendi, 530 U.S. at 490.

When confronted with Hurst, the Nevada Supreme Court relied upon its prior opinion in Nunnery v. State, 263 P.3d 235 (Nev. 2011), in finding that the weighing determination was not a factual finding that was susceptible to the beyond-a-reasonable-doubt standard of proof. Pet. App. 11a (citing Nunnery, 263 P.3d at 252). Although several other state courts similarly concluded, in the wake of Ring v. Arizona, that the weighing of aggravating circumstances against mitigating circumstances did not implicate the Sixth Amendment, these decisions reflected the not unique, but now-discredited opinion, that "Ring does not extend to the weighing phase." Brice v. State, 815 A.2d 314, 322 (Del. 2003), overruled by Rauf v. State, 145 A.3d 430 (Del. 2016); see also Oken v. State, 835 A.2d 1105, 1117 (Md. 2003); Ex Parte Waldrop, 859 So.2d 1181, 1189 (Ala. 2002). Hurst has now clarified that this narrow view of fact-finding in capital sentencing, which focused only on the determination of a statutory aggravating factor, is faulty. In the context of the Florida statute, Ring's protections extended to the determination "'[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Hurst, 136 S.Ct. at 622, quoting § 921.141(3), Fla. Stat. Because the Nevada statute contains an identical requirement for imposing a sentence

of death, it is impossible for the Nevada Supreme Court to distinguish Hurst and continue to conclude that the Nevada death penalty scheme is constitutional so far as it has been interpreted to remove a burden of proof from the weighing determination. See Hurst, 202 So.3d at 53. (Sixth Amendment applies to findings of fact "that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances"); Rauf, 145 A.3d at 434 (Sixth Amendment protections apply to determination "that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under [the Delaware statute], this is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'").

The Sixth Amendment is not always satisfied by the jury determination of a statutory aggravating circumstance beyond a reasonable doubt. The specific holdings of Ring and Hurst, which address the unconstitutional judicial determination of statutory aggravators, cannot be constrained to their facts. The limited holdings of those cases simply reflect the precise question presented in each. In Ring, this Court noted, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." 536 U.S. at 597 n.4. Hurst raised an identical claim. Petitioner's Brief on the Merits, Hurst v. Florida, No. 14-7505, at 17-18 ("Florida's capital sentencing scheme violates [the Sixth Amendment] because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'")

Therefore, it is no surprise that this Court's holdings specifically addressed the only constitutional infirmity Ring and Hurst challenged: the judicial determination of an aggravating circumstance. See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 17 (2011) ("We do not normally consider a separate legal question not raised in the certiorari briefs."). This Court's opinion in Hurst elucidates, however, that these holdings are narrow applications of a much broader principle: any factfinding that is a necessary precursor to a death sentence, rather than one of life imprisonment, is an "element" of the crime for Sixth Amendment purposes. Hurst, 136 S.Ct. at 619, 622.

Because it also applied a broad constitutional rule to a narrower question presented, Ring and Hurst are analogous to Apprendi. Like Ring and Hurst, Apprendi stated a simple rule: a jury, not a judge, must find any fact "that increase[s] the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. at 490. The specific holding of the case, however, addressed a narrower issue: it invalidated the judicial determination of a hate crime enhancement that acted to increase the degree, and the corresponding maximum sentence, of Apprendi's offense. Id. at 497.

In Apprendi's wake, many state and federal courts read its rule narrowly, attempting to limit Apprendi to its facts and exempt other categories of findings from its scope. In each of these cases it reviewed, this Court disapproved of this practice, repeating again and again that Apprendi's rule was expansive and unbending. After Arizona held that Apprendi did not apply to the death penalty, this Court reversed in

Ring v. Arizona, 536 U.S. 584 (2002). After the State of Washington held that Apprendi did not apply to sentencing guidelines systems as long as the sentence imposed was below the offense's statutory maximum, this Court reversed in Blakely v. Washington, 542 U.S. 296 (2004). California held that its sentencing system survived Apprendi because most defendants were helped rather than hurt by it, and it was consistent with the broad discretion judges traditionally exercised in sentencing, but this Court reversed in Cunningham v. California, 549 U.S. 270 (2007). Time and again, this Court has rejected tortured efforts by lower courts to confine the protections of the Sixth Amendment.

In light of this history, it is abundantly clear that Ring and Hurst cannot be selectively read in the narrowest way possible, limited only to their precise facts. Ring required "a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Hurst emphasized that this rule encompasses all facts necessary to a sentence of death. Hurst, 136 S.Ct. at 619. Where a state statute provides a death sentence is contingent upon factual findings that aggravating circumstances outweigh or equal mitigating circumstances, those findings also fall under Ring and Hurst's umbrella. Id. at 622.

Therefore, because it is an element of capital murder, a factual finding that mitigating circumstances do not outweigh aggravating circumstances must be proven beyond a reasonable doubt. The jury here found 19 mitigating circumstances and three aggravating circumstances as to both victims. 14 ROA 3080; 15 ROA 3081-83, 3089-90. The mitigation included childhood trauma due to separation from his parents, brain

damage, untreated anxiety, mental health issues, and the jurors found that Mr. Jeremias was under the influence of controlled substances at the time of the offense. 15 ROA 3082-83, 3090. Had the jury been properly instructed, there is a reasonable probability that at least one juror would have found that the State did not meet its burden of proving beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating.

The Nevada Supreme Court's decision is also invalid under the Fifth and Fourteenth Amendment, because elements of a crime, including the determination that aggravating circumstances outweigh or equal the mitigating circumstances, must be proven beyond a reasonable doubt. Where the Sixth Amendment necessitates that facts supporting a death sentence be proven to a jury, those facts must also be established beyond a reasonable doubt. The Fifth Amendment's due process guarantee requires that, in all criminal prosecutions, the government prove each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. As this Court noted in Sullivan v. Louisiana,

> it is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. 275, 278 (1993).

The Apprendi line of cases clearly incorporate this requirement, as the Court noted time and time again that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added); Booker, 543 U.S. at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); Cunningham, 549 U.S. at 273 "[f]actfinding to elevate a sentence …, this Court's decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard"). Jury determination of these facts, without requiring the standard of proof guaranteed by the Fifth Amendment, is insufficient to meet constitutional muster. The Nevada Supreme Court's opinion fails to comply with the Fifth Amendment's mandate.

3. Kansas v. Carr did not address this issue.

The Nevada Supreme Court found that this Court's decision in Kansas v. Carr, 136 S.Ct. 633 (2016), supports its conclusion that the weighing process is not a factual finding. Pet. App. 11a. Carr addressed a defendant's claim that the Eighth Amendment required a capital-sentencing court to instruct a jury that mitigating circumstances need not be proved beyond reasonable doubt. Id. at 641. This Court found that the jury instructions in that case were not ambiguous, after noting that the instructions made it clear "that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt[.]"

Id. at 643. Moreover, Carr was an Eighth Amendment case, not a Fifth or Sixth Amendment case, and did not have occasion to squarely address this issue because the Eighth Amendment does not require states to have statutory schemes in which the jury must "balance aggravating against mitigating circumstances pursuant to any special standard." Zant v. Stephens, 462 U.S. 862, 873-74 (1983).

C. This case presents this Court with an appropriate vehicle for resolving this extremely important issue.

The fundamental principle of Ring, Apprendi, and Hurst is that the defendant has a "right to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " Ring, 536 U.S. at 602, quoting United States v. Gaudin, 515 U.S. 506, 510 (1995). In the context of the Nevada sentencing scheme, in which a finding that statutory aggravating circumstances are not outweighed by mitigating evidence is necessary to sentence a defendant to the death penalty, the determination must be made by a jury under a beyond a reasonable doubt standard. Because this case squarely presents this issue on direct appeal, the Nevada Supreme Court addressed the merits, and there is no question of retroactivity, this case is an appropriate vehicle for this Court's resolution of the issue.

II. The Confrontation Clause Should Apply To The Jury's Eligibility Determination In A Capital Case

Thirty-one states and the United States authorize the imposition of capital punishment. In numerous decisions over the past few decades, this Court has defined and clarified the procedural rules the Constitution requires when the prosecution seeks this ultimate sanction. In recent years, though, a substantial split of authority has

developed regarding whether the Confrontation Clause applies to evidence that is offered by the prosecution to establish eligibility for the death penalty. Given the extent of the split and the "fundamental" character of the rights at stake, Pointer v. Texas, 380 U.S. 400, 403 (1965), this issue calls for the Court's immediate attention.

A. Courts Are Intractably Divided Over Whether The Confrontation Clause Applies To Evidence Offered To Prove Eligibility For The Death Penalty.

Two state supreme courts and one federal court of appeals hold that the Confrontation Clause's protections do not apply to evidence offered to establish eligibility for the death penalty.

In the decision at issue here, the Nevada Supreme Court reaffirmed its position - first articulated in Summers v. State, 148 P.3d 778, 783 (Nev. 2006) (reproduced at Pet. App. 16a-32a) - that the Confrontation Clause “does not apply to evidence admitted during a capital penalty trial[.]” Pet. App. 14a. The Nevada Supreme Court based its holding on Summers, which in turn based its decision on Williams v. New York, 337 U.S. 241 (1949). In Williams, this Court held that a capital defendant did not have the right to confront evidence offered to influence the judge's selection decision. See Summers, Pet. App. 20a-21a. In the Nevada Supreme Court's view, that decision also applies to evidence offered by the State to obtain the death penalty. Id. at 219.[2]

[2]Between Summers and this case, the Nevada Supreme Court has repeatedly affirmed Summers' holding. See Burnside v. State, 352 P.3d 627, 650 (Nev. 2015); Maestas v. State, 275 P.3d 74, 86 (Nev. 2012); Browning v. State, 188 P.3d 60, 74 (Nev. 2008).

The Idaho Supreme Court likewise holds categorically that "the Confrontation Clause does not apply at [capital] sentencing proceedings." State v. Dunlap, 313 P.3d 1, 34, 41 (Idaho 2013). In rejecting a defendant's argument that the trial court erred in allowing the prosecution to introduce two mental health reports to prove two aggravating circumstances, the Idaho Supreme Court ruled that a capital defendant need never be afforded "the opportunity to confront and cross-examine live witnesses in his sentencing proceedings." Id. (quoting Sivak v. State, 731 P.2d 192, 211 (Idaho 1986)).[3]

The Eleventh Circuit also has held, in the context of evidence offered to prove death-eligibility, that "a defendant does not have a right to confront hearsay declarants at a capital sentencing hearing." Muhammad v. Sec'y, Fla. Dep't of Corr., 733 F.3d 1065, 1074 (11th Cir. 2013); see also id. at 1073-77. Like the Nevada and Idaho Supreme Courts, the Eleventh Circuit reads Williams as categorically suspending the Confrontation Clause from "capital sentencing proceedings." Id. at 1073.[4]

The majority of courts that have addressed the issue have held the opposite. Those courts have concluded - as the dissent in Summers would have held - that "the Sixth Amendment right to confrontation applies to evidence presented during the

[3]The Idaho Supreme Court claimed that its holding was consistent with United States v. Fields, 483 F.3d 313 (5th Cir. 2007). But that case involved evidence "relevant only to penalty selection." Id. at 335. The Fifth Circuit did not consider whether the Confrontation Clause applies to evidence offered to establish death-eligibility.

[4]Like the Idaho Supreme Court, the Eleventh Circuit claimed that its decision was consistent with Fields, as well as other federal appellate cases. Muhammad, 733 F.3d at 1074. But the Eleventh Circuit overlooked that all of those cases involved only selection, not death-eligibility, evidence.

eligibility phase of a capital sentencing hearing." Summers, 148 P.3d at 787 (Rose, C.J. concurring in part and dissenting in part); Pet. App. 28a.

Six state courts of last resort have adopted this position. Five of them adopted the position in the course of finding Confrontation Clause violations in the cases before them. See State v. Robinson, 796 P.2d 853, 861-62 (Ariz. 1990) (finding violation); State v. McGill, 140 P.3d 930, 942 (Ariz. 2006) (reciting rule); Rodgers v. State, 948 So. 2d 655, 663-65 (Fla. 2006); Pitchford v. State, 45 So. 3d 216, 251, 252 & n.100 (Miss. 2010); State v. Bell, 603 S.E.2d 93, 115-16 (N.C. 2004); State v. Nobles, 584 S.E.2d 765, 767-72 (N.C. 2003); Russeau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005). The sixth court, the Kansas Supreme Court, held in an opinion providing guidance for a remand that the Confrontation Clause categorically applies during "the penalty phase of a capital proceeding." State v. Carr, 331 P.3d 544, 723-24 (Kan. 2014), rev'd on other grounds, Kansas v. Carr, 136 S.Ct. 633 (2016).[5]

While holding that the Confrontation Clause does not apply to "selection" evidence, the Fourth Circuit also suggested recently that the right does apply during "the guilt and eligibility phases of trial," which it said involve "constitutionally significant factual findings." United States v. Umaña, 750 F.3d 320, 347-48 (4th Cir. 2014) (internal quotation marks omitted). The Solicitor General relied and elaborated

[5]The State of Kansas challenged this holding in its petition for certiorari to the extent it applied to "the 'selection' phase of capital sentencing proceedings." Pet. in No. 14-450 at i, 21-27 (emphasis omitted). The State did not challenge the holding as applied to evidence offered to prove death-eligibility. This Court did not grant certiorari on the issue. 135 S. Ct. 1698 (2015).

upon this distinction in this Court. See Br. in Opp. at I, 20-23, Umaña v. United States, No. 14-602.

Numerous federal district courts also have held that the Confrontation Clause applies to evidence offered to prove a defendant's eligibility for the death penalty. See, e.g., United States v. Concepcion Sablan, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007); United States v. Mills, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006); United States v. Jordan, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005).

The dissent in Summers summarized the reasoning that drives the majority view. Courts in the majority maintain that Williams does not apply to eligibility evidence because subsequent cases make clear that such evidence is offered to prove "a new finding of fact" necessary to impose the death penalty, and post-Williams case law establishes that the full panoply of constitutional protections applies in this circumstance. Summers, Pet. App. 28a (quoting Specht v. Patterson, 386 U.S. 605, 608-10 (1967), and citing Ring v. Arizona, 536 U.S. 584 (2002)). The Summers dissent also stressed that "Williams long predates [this] Court's many decisions since 1976 that recognize that death is different" and that it calls for greater procedural safeguards than in ordinary sentencing proceedings. Pet. App. 31a.

Courts on both sides of this conflict have recognized that "there is a great deal of disagreement over whether and to what extent" the Confrontation Clause applies to evidence offered to prove death eligibility. United States v. Mills, 446 F. Supp. 2d at 1128; Pitchford, 45 So. 3d at 251-52 ("While we are aware of federal authority that the Sixth Amendment does not apply at [capital] sentencing proceedings, this Court's

precedent holds otherwise." (footnote omitted)); State v. Maestas, 299 P.3d 892, 974 (Utah 2012) (noting "that other courts that have addressed this issue have reached conflicting results," but not deciding the issue itself). One court summed up "the legal landscape" as "a quagmire." Muhammad v. Tucker, 905 F. Supp. 2d 1281, 1296 (S.D. Fla. 2012), rev'd sub nom. Muhammad v. Sec'y, Fla. Dep't of Corr., 733 F.3d 1065 (11th Cir. 2013).

The split will not resolve itself. The Nevada Supreme Court has insisted that it will not extend confrontation rights to sentencing "[a]bsent controlling authority" from this Court, Summers, Pet. App. 22a, and no other court has been willing to reexamine its views as the split has widened. Only this Court can secure uniformity on the issue.

B. The Question Presented Is Extremely Important

The conflict in the lower courts over the applicability of the Confrontation Clause to evidence offered to establish death eligibility is a matter of great consequence. This Court repeatedly has granted certiorari to determine how a constitutional right enumerated in the Bill of Rights or established in this Court's case law applies in death penalty proceedings. See, e.g., Ring v. Arizona, 536 U.S. 584 (2002) (right to jury trial); id. (right to have all elements proven beyond a reasonable doubt); Simmons v. South Carolina, 512 U.S. 154 (1994) (right to jury instructions concerning future dangerousness); Turner v. Murray, 476 U.S. 28, 33 (1986) (right to question jurors regarding possible bias); Bullington v. Missouri, 451 U.S. 430 (1981) (protection against double jeopardy); Estelle v. Smith, 451 U.S. 454, 461-63 (1981) (right against self- incrimination).

The right to confrontation is every bit as important as these other rights. The Clause "ensure[s] reliability of evidence" by enabling defendants to challenge prosecutorial evidence "in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). This Court has described cross-examination, in turn, as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It allows defendants to probe and expose exaggerated, mistaken, or fabricated assertions that otherwise would escape detection. And when eligibility for the death penalty is at issue, this truth-distilling function is especially critical because there is a need for "a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

Clarifying the substantive constitutional rules governing capital sentencing proceedings is essential not just to protect defendants' rights, but also to conserve judicial and administrative resources. The sooner this Court resolves whether the Confrontation Clause applies to evidence offered to prove eligibility for the death penalty, the sooner courts and lawyers can respond accordingly during trials and preclude this issue from being continually litigated on appeal and in post-conviction proceedings.

C. This Case Is An Excellent Vehicle For Resolving The Conflict.

During this capital trial, a detective testified that he obtained four statements during interrogations from Ivan Rios, who was subsequently charged as Mr. Jeremias's co-defendant. Mr. Rios implicated Mr. Jeremias during the interrogation. 13 ROA

2834-38. A transcript of the fourth interrogation was admitted during the penalty phase of the trial, without contemporaneous objection, as Exhibit 34. 13 ROA 2838; 25 ROA 5413-47. Mr. Rios did not testify during Mr. Jeremias's penalty trial, but in his interrogation he implicated Mr. Jeremias, gave evidence which was directly relevant to the aggravating circumstance of murder committed in the course of a robbery, and he provided other matter evidence presented in support of non-statutory aggravating circumstances. 13 ROA 2839-40, 2850. There was no showing that Rios was unavailable for trial or that he was ever subject to cross-examination regarding his statements to the detectives. Nonetheless, the testimony and exhibit were admitted against Jeremias during the penalty phase of the trial.

Prior to Mr. Jeremias's case, it has long been the law in Nevada that Bruton v. United States, 391 U.S. 123 (1968), which prohibits introduction of a statement by a co-defendant who does not testify but who implicates a defendant, applies to a capital penalty trial. In Lord v. State, 806 P.2d 548, 557 (Nev. 1991), the Nevada Supreme Court reversed a sentence of death based upon the district court's admission of testimony from a detective, who read to the jury a transcript of a co-defendant's confession. In doing so, it cited cases from other jurisdictions which also applied Bruton to capital penalty trials. Id. at 806 P.2d at 557-58 (citing Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986); State v. Williams, 690 S.W.2d 517 (Tenn. 1985); People v. Aranda, 407 P.2d 265 (Cal. 1965)). In Lord, the Nevada Supreme Court found that "the need for cross-examination to test the fundamental reliability of co-defendants' often

suspect statements is no less great in the penalty phase than in the guilt phase." 806 P.2d at 558.

The rule established in Lord, which holds that Bruton applies to penalty phase evidence in a capital case, was recognized by the Nevada Supreme Court in Summers v. State, 148 P.3d 778, 782 (Nev. 2006). Pet. App. 20a. In that case, the Nevada Supreme Court held that the Confrontation Clause in general does not apply to the penalty phase of a capital trial, but it did not overrule Lord and instead recognized that the Bruton question was more narrow than the broad Confrontation Clause issue.

Despite the existence of Lord, and its long-standing and clearly articulated holding that Bruton applies during a capital penalty trial, the State presented the testimony of a detective about Mr. Rios's interrogation and his repeated statements implicating Mr. Jeremias. The defense objected to the admission of hearsay evidence, including voluminous arrest reports and other testimonial hearsay evidence under Crawford, while acknowledging that the Nevada Supreme Court had held in Summers that Crawford did not apply in a capital penalty trial. 13 ROA 2746-48. The district court overruled the objection. 15 ROA 3157-58. The jury was instructed, over a defense objection, that it could consider hearsay evidence during the penalty trial. 14 ROA 3063; 15 ROA 3157-58. The prosecutor relied on this evidence during closing arguments. 15 ROA 3199-3202.

The issue was presented on direct appeal and was briefed by both Mr. Jeremias and the State of Nevada in two portions of the appeal. The first directly concerned the Lord and Bruton violations. The Nevada Supreme Court held that admission of the

evidence was not plain error. Jeremias v. State, 412 P.3d 43, 52 (Nev. 2018); Pet. App. 9a. The second issue, which concerned admission of all hearsay evidence under Crawford, was not initially addressed by the Nevada Supreme Court. On petition for rehearing, during which Mr. Jeremias argued that rehearing should be granted because the Nevada Supreme Court did not address this issue, the Court responded:

> This court considered and rejected claim "I" of appellant's opening brief. Appellant acknowledged that this court held in Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006), that Crawford v. Washington, 541 U.S. 36 (2004), does not apply to evidence admitted during a capital penalty trial, and we decline his invitation to overrule Summers.

Pet. App. 14a.

Petitioner Jeremias squarely argued in the trial court and Nevada Supreme Court that the Confrontation Clause applied to the evidence the State intended to offer to prove death-eligibility, as well as evidence presented as "other matter" evidence, which was presented during the penalty phase of the trial. The Nevada Supreme Court rejected the argument on the merits and affirmed its continuing reliance on Summers and its holding that Crawford does not apply to the penalty phase of a capital trial. Pet. App. 14a.

This issue does not present concerns about retroactivity and fairly presents the question for this Court's review.

D. The Nevada Supreme Court's Holding Is Incorrect.

In a series of cases, this Court has held that the protections against double jeopardy, Bullington v. Missouri, 451 U.S. 430, 446 (1981), the privilege against self-incrimination, Estelle v. Smith, 451 U.S. 454, 463 (1981), and the right to an

impartial jury, Morgan v. Illinois, 504 U.S. 719, 728-29 (1992), all apply with respect to death-eligibility determinations. And most recently, this Court held in Ring v. Arizona, 536 U.S. 584 (2002), that the Sixth Amendment's jury-trial guarantee and the constitutional requirement of proof beyond a reasonable doubt apply to evidence offered to prove eligibility for the death penalty. This is because aggravating factors expose defendants to heightened punishment and thus "operate as 'the functional equivalent of an element of a greater offense.'" Id. at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

The Sixth Amendment's Confrontation Clause should similarly extend to the eligibility phase of death penalty proceedings. Similar to these other constitutional safeguards, the Confrontation Clause is a "fundamental" rule governing the proof of elements of crimes. Pointer v. Texas, 380 U.S. 400, 403 (1965). The prosecution should not be able to expose a defendant to the death penalty without satisfying the Clause's requirements.

Indeed, when state law locates the jury's death- eligibility determination in the guilt phase - by creating a "capital murder" offense, for example - defendants are already afforded the full range of Sixth Amendment trial rights, including the right to confrontation. See Lowenfield v. Phelps, 484 U.S. 231, 244-246 (1988) (describing state systems that determine eligibility at the guilt phase). Those Sixth Amendment protections should not disappear when a state law like Nevada's shifts the eligibility determination to a sentencing proceeding. Just as it makes no difference to "the jury-trial guarantee of the Sixth Amendment" whether statutory aggravators are

called "elements of the offense, sentencing factors, or Mary Jane," Ring, 536 U.S. at 610 (Scalia, J., concurring), the Confrontation Clause's applicability should not turn on whether death-eligibility is determined at a "guilt" or a "sentencing" phase of a capital trial.

Contrary to the Nevada Supreme Court's assertion, see Summers, Pet. App. 20a -21a, this conclusion is not at odds with this Court's decision in Williams v. New York, 337 U.S. 241 (1949). In that case, this Court held that the right of confrontation did not apply to information supplied to aid a judge's determination whether to sentence a defendant to death. Id. at 251-52. But in New York in the 1940's, a conviction for first-degree murder, standing alone, subjected a defendant to capital punishment. See id. at 242 n.2; Specht v. Patterson, 386 U.S. 605, 606-07 (1967). The evidence at issue in Williams thus pertained only to selection - that is, whether to impose a sentence already "within statutory limits." Apprendi, 530 U.S. at 481-82 (emphasis omitted).

Williams has nothing to say about the "radically different situation" where the prosecution offers evidence at a sentencing proceeding in which "a new finding of fact" is necessary to establish eligibility for heightened punishment. Specht, 386 U.S. at 608. In that situation, this Court has distinguished Williams and held a defendant has a right to "be confronted with the witnesses against him" when the prosecution offers evidence to increase punishment from a term of years to life imprisonment. Id. at 610. The same should be true when increasing a sentence from life in prison to death. See Buchanan v. Angelone, 522 U.S. 269, 275 (1998) (eligibility determinations require "differ[ent] constitutional treatment" from selection determinations); Bullington, 451

U.S. at 446 (likening the sentencing regime in Specht to an eligibility determination in a modern death-penalty regime).

Even apart from the formal logic of the Ring/Apprendi rule concerning findings of fact that expose defendants to heightened punishment, this Court's jurisprudence makes clear that confrontation rights should apply to evidence offered to prove death-eligibility. The Confrontation Clause applies, by its terms, to "all criminal prosecutions," U.S. Const. amend. VI, and this Court has held that a death-eligibility proceeding is tantamount to "a trial on the issue of guilt and innocence." Bullington, 451 U.S. at 444; accord id. at 446. Furthermore, "[b]ecause the death penalty is unique 'in both its severity and its finality,'" this Court has repeatedly "recognized an acute need for reliability in capital sentencing proceedings." Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.)); see also Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) (noting the "heightened need for reliability in the determination that death is the appropriate punishment" (internal quotation marks omitted)); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stressing that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

As discussed above, there is no tool for ensuring the reliability of prosecutorial evidence more vital than the right of confrontation. The Clause requires testimonial statements to be given in open court subject to "testing in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). And centuries of

experience have shown that this process "is much more conducive to the clearing up of truth" than hearsay evidence. 3 William Blackstone, Commentaries on the Laws of England *373 (1768); see also Mattox v. United States, 156 U.S. 237, 242-43 (1895) (confrontation allows jury to determine whether testimonial assertions are "worthy of belief"); Matthew Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better"). This safeguard should not be denied where defendants most need it - during proceedings determining whether they will be sentenced to death.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED this 20th day of July, 2018.

Respectfully submitted,

/s/ JONELL THOMAS

JONELL THOMAS
Clark County Special Public Defender

APPENDICES

Jeremias v. State,
412 P.3d 43 (Nev. 2018) 1a-13a

Order Denying Rehearing (unpublished)
(Nevada Supreme Court) 14a-15a

Summers v. State,
148 P.3d 778 (Nev. 2006) 16a-32a

Jeremias v. State

Supreme Court of Nevada

March 1, 2018, Filed

No. 67228

Reporter

412 P.3d 43 *; 2018 Nev. LEXIS 10 **; 134 Nev. Adv. Rep. 8; 2018 WL 1102477

RALPH SIMON JEREMIAS, Appellant, vs. THE STATE OF NEVADA, Respondent.

Prior History: [**1] Appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery and burglary while in possession of a deadly weapon, and two counts each of robbery with the use of a deadly weapon and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Disposition: Affirmed.

Counsel: David M. Schieck, Special Public Defender, and JoNell Thomas, Chief Deputy Special Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Jonathan E. VanBoskerck, Chief Deputy District Attorney, and David L. Stanton and Christopher Burton, Deputy District Attorneys, Clark County, for Respondent.

Judges: Stiglich, J. We concur: Douglas, C.J. Gibbons, J. Pickering, J. Hardesty, J. Parraguirre, J.

Opinion by: STIGLICH

Opinion

[*46] By the Court, STIGLICH, J.:

This opinion addresses matters which arose during appellant Ralph Jeremias' trial for the murders of Brian Hudson and Paul Stephens. We focus the bulk of our discussion on Jeremias' claim that the district court violated his right to a public trial by closing the courtroom to members of the public during jury selection without making sufficient findings [**2] to warrant the closure. Under *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), such a violation constitutes structural error, which usually entitles an appellant to automatic reversal of his judgment of conviction without an inquiry into whether the error affected the verdict. But Jeremias did not object to the closure and thus did not preserve the error for appellate review. Under Nevada law, this means he must demonstrate plain error that affected his substantial rights. Following the United States Supreme Court's guidance in *Weaver v. Massachusetts*, 582 U.S. __, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), which discussed the violation of the right to a public trial during jury selection in the context of an ineffective-assistance-of-counsel claim, we

hold that Jeremias fails to satisfy plain error review. We also conclude that no relief is warranted on his other claims and that his death sentences are supported by our independent review of the record under NRS 177.055(2).

FACTS AND PROCEDURAL HISTORY

On June 8, 2009, Brian Hudson and Paul Stephens were found murdered in the apartment they shared. They had both been shot in the head, and it appeared they had been robbed. A witness who lived in the same apartment complex told law enforcement that she saw two men, one with light skin and one with darker skin, near the scene [**3] around the time of the murders. Another witness said [*47] that, after hearing gunshots, he saw a red truck speed from the complex.

Detectives learned that the victims' credit cards had been used at various locations after the murders. They obtained surveillance videos from those locations and identified a potential suspect and a vehicle he was driving. That vehicle model was often used as a rental car, so detectives searched rental car records. This search led them to Jeremias, who matched the person who had been seen in the surveillance footage using the victims' bank cards. Jeremias was identified by one of the witnesses as the darker-skinned man she had seen in the apartment complex. Jeremias' friend, Carlos Zapata, drove a red truck that was identified by the other witness as that which had left the complex after the shooting.

After further investigation, law enforcement determined that Jeremias committed the murders in the course of a robbery he planned with Zapata and a third individual named Ivan Rios. They were all charged for their roles in the murders; Zapata pleaded guilty and testified on behalf of the prosecution at Jeremias' trial.[1] According to Zapata, Jeremias proposed robbing [**4] the victims because he believed there would be drugs and money in their apartment. The plan was for Jeremias, who was friendly with the victims, to gain entry to the apartment. When Jeremias texted the others that everything was ready to go, Zapata would run in and grab the property and Rios would drive them away in Zapata's truck. With the plan set, the group drove to the victims' apartment and Jeremias went inside. While waiting for the signal, Zapata heard gunshots. Jeremias returned empty-handed, and the group fled the scene. Later, Jeremias complained that "it's all for nothing" unless they went back to the apartment and took the property he had left behind. Rios apparently balked, so Jeremias and Zapata took a rental car back to the apartment and stole the property. Afterward, the entire group went out celebrating with the victims' money.

Jeremias testified in his own defense. He admitted that he had been in the victims' apartment and that he stole their property, but he denied there was a plan to rob the victims or that he was involved in their deaths. Instead, he claimed he went to the victims' apartment to buy marijuana. When he knocked on their front door, it "popped open" [**5] and he saw them with blood on their faces. He knew they were dead, and in a state of shock and intoxication, he decided to take their property.

---

[1] Rios was tried separately and was acquitted.

The jury found Jeremias guilty of conspiracy to commit robbery, burglary while in possession of a deadly weapon, two counts of robbery with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. With respect to the murders, the jury unanimously found they were willful, deliberate, and premeditated and were committed during the perpetration or attempted perpetration of a burglary and robbery. The jury also unanimously found each of the aggravating circumstances alleged (that the murders were committed in the course of a robbery, the murders were committed to prevent a lawful arrest, and Jeremias was convicted of more than one murder), and at least one juror found several mitigating circumstances. The jury unanimously concluded that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death for each murder. This appeal followed.

DISCUSSION

Exclusion of Jeremias' family from the courtroom during jury selection

Jeremias contends that the district court violated [**6] his right to a public trial by excluding members of his family from the courtroom during voir dire. As explained in more detail below, we conclude that Jeremias forfeited any error by failing to object and fails to demonstrate that this court should grant relief under plain error review.

Jeremias' claim is based on *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). In *Presley*, the trial court judge noticed an observer sitting in the audience as jury selection was about to commence. *Id.* at 210. The judge [*48] told the observer that he had to leave the courtroom because all of the seats would be needed for prospective jurors. *Id.* The observer was the defendant's uncle, and the defendant objected to "the exclusion of the public from the courtroom." *Id.* (quotation marks omitted). The judge reiterated that there would not be enough seats and noted that it would be inappropriate for the uncle to "intermingle" with the prospective jurors. *Id.* When the matter was raised on appeal, the Supreme Court of Georgia determined that the judge had identified a compelling interest for closing the courtroom. *Id.* at 211. Reversing that decision, the United States Supreme Court explained that limited space in a courtroom and concerns that the defendant's family might interact [**7] with potential jurors were inadequate reasons to exclude the public entirely, and the trial court was required to take reasonable measures to accommodate public attendance, such as "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Id.* at 215. Because the trial court had relied on inadequate reasons to close the proceedings and did not consider reasonable alternatives, the Court determined that it committed structural error, warranting automatic reversal and remand for a new trial. *Id.* at 216.

The facts of this case are similar. Before potential jurors entered the courtroom, the prosecutor objected to having members of Jeremias' family present during the jury selection process. The prosecutor stated that he had a "number of reasons" for wanting to exclude Jeremias' family and was willing to identify them on the record, but defense counsel had already told Jeremias' family that they would be asked to leave the courtroom. Defense counsel remained silent. The judge

then stated: "Okay. And just so the family knows, we use every single seat for the jurors. So we would need [**8] to kick you out, anyway. At least until we get started with the jury selection and get a few people excused, because we don't have enough chairs. We bring the maximum number we can fit with the chairs." Apparently, Jeremias' family then left the courtroom, and it is unclear when they returned.

At first blush, the facts of this case seem to neatly align with those in *Presley*. But there is an important distinction in that the defendant in *Presley* objected to the closure whereas Jeremias did not. The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right...." (internal quotation marks omitted)).[2] Nevada law provides a mechanism for an appellant to seek review of an error he otherwise forfeited. NRS 178.602 (explaining when an unpreserved error "may be noticed"). Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an "error"; (2) the error is "plain," meaning that [**9] it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

For the purposes of this discussion, we will assume that Jeremias satisfies the first two prongs by demonstrating that the district court closed the courtroom to members of the public (his family) for an inadequate reason (courtroom congestion) without balancing other interests or exploring reasonable [*49] alternatives. *See Presley*, 558 U.S. at 216. Whether he is entitled to relief therefore turns on whether he can satisfy the third prong: that the error affected his substantial rights.

On that point, Jeremias suggests that the error necessarily affected his substantial rights because it has been deemed structural, which means he would have been entitled to automatic reversal without an inquiry into whether he was harmed had the error been preserved. *See Weaver v. Massachusetts*, 582 U.S. __, __, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017) (discussing the structural error doctrine). He is mistaken. Under Nevada law, a plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a "grossly unfair" outcome). *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *Black's Law Dictionary* 1149 (10th ed. 2014) (defining miscarriage of justice). [**10] But as the United States Supreme Court recently explained in *Weaver*, a violation of the right to a public trial during jury selection is not inherently prejudicial, nor does it render every trial unfair. Outside of circumstances where a defendant preserves the error at trial and raises it on direct

---

[2] Pointing to *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004), Jeremias argues that the right to a public trial cannot be forfeited. In addition to disagreeing with *Walton*, we note that it is an outlier and somewhat conflicts with United States Supreme Court precedent. *See generally Levine v. United States*, 362 U.S. 610, 619-20, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960) (observing, in the due process context, that "[d]ue regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal").

review, a defendant must demonstrate that relief is warranted by pointing to the facts and circumstances of the case presented.[3]

Here, Jeremias fails to establish that the exclusion of his family for a small portion of voir dire prejudiced him or rendered his trial unfair. Like in *Weaver*, the courtroom was open during the evidentiary portion of the trial, there were members of the venire who did not become jurors but were able to observe the selection process, there is no real assertion that any juror lied or that the prosecutor or judge committed misconduct during voir dire, and there was a record made of the questioning that took place during the closure. *See id.* at __, 137 S. Ct. at 1913. Although permitting Jeremias' family members to remain in the courtroom would have limited his exposure to the harms the public-trial right was intended to combat, "[t]here has been no [**11] showing . . . that the potential harms flowing from a courtroom closure came to pass in this case," nor is there any evidence to suggest that "the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Id.* Thus, while he might have been entitled to relief under different circumstances, *see generally id.* ("If, for instance, defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with little more detail."), he has not demonstrated a violation of his substantial rights under the circumstances presented. Accordingly, he fails to satisfy plain error review.

Even assuming otherwise, the decision whether to correct a forfeited error is discretionary, *City of Las Vegas v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Rep. 82, 405 P.3d 110, 112 (2017), and we decline to exercise that discretion here. Considered in context, Jeremias seeks a new trial because members of his family were not able to observe jury selection for a brief period of time (the record suggests a few hours), despite [*50] the strong evidence against him and the fact that there is no serious suggestion that [**12] their absence had any effect on the proceeding. We are bound by authority which holds that these facts constitute a violation of Jeremias' right to a public trial. *But see Weaver*, 582 U.S. at __, 137 S. Ct. at 1914 (Thomas, J., concurring) (expressing willingness to reconsider that the right to a public trial extends to jury selection, as held in *Presley*). And the closure should have been avoided, particularly given that members of the public had a right to be present during the jury selection process. *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 508-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Nevertheless, the violation of Jeremias' right to a public trial was unquestionably trivial under the circumstances.

---

[3] Regarding the similar federal plain error test, the Court had previously noted "the possibility" that structural errors "might affect substantial rights regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) (internal quotation marks omitted). Although we acknowledge that *Weaver* discusses the violation of the right to a public trial in a different context (an ineffective-assistance claim on postconviction review), it makes clear that a violation of the right to a public trial during jury selection only warrants reversal without regard to its effect on the verdict when it has *been preserved* at trial and raised on direct appeal. *See* 582 U.S. at __, 137 S. Ct. at 1910 ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)); *id.* at __, 137 S. Ct. at 1911-12 (listing cases and stating "[t]he errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal"); *id.* at __, 137 S. Ct. at 1912 ("The reason for placing the burden on the petitioner in this case, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim." (internal citation omitted)).

Perhaps more importantly, Jeremias' failure to object could reasonably be construed as intentional. *See Jezdik v. State*, 121 Nev. 129, 140, 110 P.3d 1058, 1065 (2005) (declining to correct a forfeited error where the record did not establish the reason for counsel's failure to object). The closure did not happen under the radar. *Cf Gonzalez v. Quinones*, 211 F.3d 735, 736 (2d Cir. 2000) (considering a closure where a court officer locked the doors to the courtroom unbeknownst to the judge and parties). The prosecutor openly stated that he was requesting removal of Jeremias' family, and indicated that his reasons for doing so involved matters not yet on the record, which he had relayed to Jeremias' attorney. Jeremias said nothing. [**13] While not rising to the level of invited error, *see Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (recognizing that "[i]n most cases application of the [invited error] doctrine has been based on affirmative conduct inducing the action complained of (internal quotation marks omitted)), or waiver, *see Ford v. State*, 122 Nev. 796, 805, 138 P.3d 500, 506 (2006) (recognizing that a waiver is an intentional relinquishment of a known right), correcting the error under these circumstances would encourage defendants who are aware their rights are being violated to do nothing to prevent it, knowing that they can obtain a new trial as a matter of law in the event they are convicted. This would erode confidence in the judiciary and undermine the integrity of the criminal justice system, *see United States v. Vonn*, 535 U.S. 55, 73, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002) (emphasizing the value of finality); *Puckett v. United States*, 556 U.S. 129, 140, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) (requiring an objection to prevent criminal defendants from "gaming" the justice system), particularly since resolving the entire issue here would have been as easy as setting aside four additional seats and bringing in four fewer prospective jurors, *see Weaver*, 582 U.S. at __, 137 S. Ct. at 1912 (observing that "when a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed," but when a defendant does not object, "the trial court [**14] is deprived of the chance to cure the violation"). For all of these reasons, we conclude that no relief is warranted.

Questioning of Zapata

Jeremias next challenges the State's questioning of Zapata, arguing that the prosecutor did not follow correct procedures to refresh Zapata's recollection and used a transcript to guide his testimony.[4] *See* NRS 50.125 (discussing the refreshing recollection doctrine).

"Before refreshing a witness's memory it must appear that the witness has no recollection of the evidence to be refreshed." *Sipsas v. State*, 102 Nev. 119, 123, 716 P.2d 231, 233 (1986). Without first establishing that Zapata's memory needed refreshing, the prosecutor repeatedly referred him to a transcript of his interview with law enforcement during direct examination. The prosecutor also asked Zapata to read aloud from the transcript instead of testifying from his memory. This questioning was inappropriate, and we conclude that the district court abused its discretion in overruling Jeremias' valid objections to it. *See* NRS 50.115 (recognizing that the

[4] Jeremias challenges this questioning on other grounds, but he did not contemporaneously object on those grounds and fails to demonstrate plain error regarding them.

district court has discretion to control the questioning of witnesses).[5] [*51] The prosecutor apparently believed his method of questioning was justified because Zapata admitted that he had not "memorized" the transcript and [**15] did not remember what he told police "word for word." But Zapata's inability to remember what he told police verbatim did not authorize the prosecutor to guide his testimony under the guise of refreshing his recollection, and it certainly did not authorize the prosecutor to ask Zapata to read from the transcript rather than testify from his own memory. *See Rush v. Ill. Cent. R.R. Co.*, 399 F.3d 705, 718-19 (6th Cir. 2005) (explaining that a witness may not read aloud from the writing used to refresh his recollection); 28 Charles Alan Wright & Victor J. Gold, *Federal Practice and Procedure: Evidence* § 6184 (2012) (explaining that courts should not permit a witness to retain a writing "where the circumstances suggest that the writing is merely a script that is being read into evidence under the guise of refreshed recollection").

Nevertheless, we conclude that the error was harmless because Zapata directly inculpated Jeremias in the portions of his testimony that were not inappropriately guided. Moreover, the same testimony could have been elicited had the prosecutor followed proper procedure to refresh Zapata's recollection, or to impeach him if the writing failed to jog his memory or if his testimony differed from his prior statement. Therefore, although [**16] the district court abused its discretion, no relief is warranted. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) ("If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict.").

Testimony of a substitute coroner

Jeremias asserts that the district court violated his right to confrontation by permitting a coroner to testify who did not conduct the victims' autopsies. Reviewing de novo, *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009), we conclude that Jeremias' claim fails because the substitute coroner testified about independent conclusions she made based on photographs from the victims' autopsies. As such, her testimony did not violate the Confrontation Clause. *See Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010) (holding that admission of an expert's independent opinion based on evidence she reviewed does not violate the Confrontation Clause).

Testimony regarding plastic fragments

Jeremias asserts that the district court abused its discretion by permitting members of law enforcement to testify about fragments of plastic found strewn about the crime scene without first being qualified as experts. Jeremias, however, did not contemporaneously object on this ground; although he objected on this basis before trial, the district court instructed him to lodge objections to the specific portions of the [**17] testimony that he believed required an expert,

---

[5] In reaching this decision, we decline to consider the prosecutor's explanation, raised for the first time at oral argument on appeal, that there was some sort of arrangement with the defense to question Zapata in this manner to avoid testimony that they had agreed would not become part of trial. We also decline to reconsider Jeremias' request to expand the record to include Zapata's testimony from Rios' trial. We base our decision on the record as it stands.

which he did not do. Similarly, on appeal he quotes large portions of testimony regarding the plastic fragments without identifying the specific statements that allegedly required an expert. It is not clear from our review of the record that the testimony in question constituted expert testimony, and therefore, we discern no error, plain or otherwise. Moreover, it is not clear how the testimony was harmful to Jeremias. He asserts it was "highly prejudicial" because it corroborated Zapata's testimony, but he does not explain how, and it is not clear from our review of the record. For all of these reasons, we conclude that no relief is warranted on this claim.

Video of Jeremias' interrogation

After Jeremias testified and the defense rested, the State moved to admit a video recording of his interrogation. The defense objected on the ground that the State had already cross-examined Jeremias about the interrogation, and the district court overruled the objection. On appeal, Jeremias argues that permitting the jury to take the [*52] video into deliberations without first playing it in open court violated his right to confrontation.[6] Because the objection [**18] below was on a different basis than the claim asserted on appeal, we review for plain error. And Jeremias fails to demonstrate plain error because the video was, in fact, admitted into evidence. *See Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) ("To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record." (internal quotation marks omitted)). He also fails to demonstrate prejudice affecting his substantial rights because the record does not establish that the jurors viewed the video, and even if they did, his concern that the jury might have been misled by the video's editing is based on mere speculation. We therefore conclude that no relief is warranted on this claim.

Reasonable doubt instruction

Jeremias contends that the district court erred by giving the reasonable doubt instruction because it stated that the State bore the burden of proving every "material element" of the crime without defining what constitutes a material element. He concedes that his claim fails under *Bumside v. State*, 131 Nev. Adv. Rep. 40, 352 P.3d 627, 638 (2015) (holding that the "material element" language is superfluous and should be omitted in future cases, but is not so misleading or confusing to warrant reversal), [**19] but he argues that *Burnside* was wrongly decided and should be overruled. We decline to reconsider that decision and hold that no relief is warranted on this claim. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing." (footnotes omitted)).

Challenge to an aggravating circumstance

---

[6] He also contends that permitting the jury to view the video without playing it in open court violated his right to a public trial, but he fails to demonstrate error that is clear from a casual inspection of the record. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Jeremias asserts that the aggravating circumstance that he committed the murder to avoid or prevent a lawful arrest pursuant to NRS 200.033(5) is unconstitutional. This court has repeatedly held that the statute does not require an arrest to be imminent and the aggravating circumstance applies when the facts indicate that the defendant killed the victim because the defendant committed a crime and the victim could identify him if left alive. *E.g., Blake v. State*, 121 Nev. 779, 793-94, 121 P.3d 567, 576-77 (2005). Jeremias provides no cause to reconsider these decisions. *See Burk*, 124 Nev. at 597, 188 P.3d at 1124.

Other penalty-phase claims

Jeremias raises other challenges to his penalty phase that he did not preserve below. Specifically, he argues that (1) the district court violated his rights to confrontation and notice by admitting Rios' statements to law enforcement, (2) the district court violated his Second Amendment right to bear arms by admitting evidence that he was [**20] found in possession of firearms during several arrests, and (3) the prosecutor committed misconduct during the penalty phase. The first two grounds require little discussion as Jeremias fails to demonstrate plain error affecting his substantial rights. Although we reach the same judgment on his third ground, we feel it is necessary to describe that claim in more detail as it somewhat informs our mandatory review discussed below.

Jeremias' first allegation of misconduct during the penalty phase involves the prosecutor's questioning of a defense witness. As part of his mitigation case, Jeremias presented testimony from Tami Bass, a former member of the Nevada State Board of Parole, who testified about the factors the parole board considers when determining whether to grant parole to a prisoner with a parole-eligible sentence. On cross-examination, the prosecutor asked Bass if she was familiar with the case of Melvin Geary. When Bass said she was not, the prosecutor explained that Geary was a murderer sentenced to life without the possibility of parole who had his sentence commuted to a parole-eligible sentence and was released. The prosecutor then stated, "And do you know what [*53] Mr. [Geary] [**21] did when he was released from prison? . . . He stabbed another man to death." With Geary's case in mind, the prosecutor asked Bass if the parole board can make mistakes, and she agreed.

The prosecutor was entitled to make the valid point that if Jeremias was given a parole-eligible sentence, the parole board could release him, despite Bass' suggestion to the contrary. But the prosecutor could have made this point without mentioning Geary's case, or that Geary had his sentence *commuted* to a parole-eligible sentence, or that Geary went on to kill again. Bringing up the facts of Geary's case the way the prosecutor did was inappropriate. *See Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (holding that it was inappropriate for a prosecutor to reference facts of another case to promote conclusions about the defendant), *modified on other grounds by Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990). While these remarks are concerning, the issue presented by Jeremias is whether they were misleading. The prosecutor did not argue or even suggest that Jeremias' sentence could be commuted; therefore, although we disapprove of the remarks, we conclude that Jeremias fails to demonstrate plain error affecting his substantial rights regarding them.

Jeremias also challenges the prosecutor's statement [**22] during rebuttal argument that if the jury imposed a life sentence for the murder of Paul, "what's the punishment for [the murder of] Brian? Because whatever you give short of death won't be a day longer in prison. And [Brian's] life is virtually meaningless by a verdict like that." We disapprove of this remark as well. 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. The prosecutor's remark in this case tracks closely to the latter, but it is not clearly improper. *See Burnside*, 131 Nev. Adv. Rep. 40, 352 P.3d at 649-50 (concluding that the prosecutor's argument that the jury "would give value" to the victim's life by returning a death sentence was not improper in context). There is also no indication that it affected the outcome of the proceeding. Thus, we conclude that Jeremias fails to demonstrate plain error affecting his substantial rights.

Instruction regarding aggravating and mitigating circumstances

Jeremias contends that the instruction regarding the [**23] weighing of aggravating and mitigating circumstances is unconstitutional because it did not specify that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt. Although this court rejected a similar challenge in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250 (2011), Jeremias asserts that a recent United States Supreme Court decision, *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), calls *Nunnery* into question. He asserts that *Hurst* held for the first time that, where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt. And, seizing on language from some of this court's prior cases describing the weighing determination as (in part) a factual finding, he asserts that *Hurst* effectively overruled *Nunnery*. We disagree with his interpretation of *Hurst* and of Nevada's death penalty procedures.

Hurst did nothing more than apply *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to Florida's death penalty procedure; it made no new law relevant to Nevada, *See Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) (discussing *Hurst), cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831, 197 L. Ed. 2d 72 (2017), Jeremias' interpretation of *Hurst* is apparently based on the Court's description of Florida's scheme, which it criticized on the grounds that "[t]he trial court *alone* must [**24] find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t] hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" [*54] *Hurst*, 577 U.S. at __, 136 S. Ct. at 622 (second and third alterations in original) (quoting Fla. Stat. Ann. § 921.141(3) (West 2015)). Although that sentence appears to characterize the weighing determination as a "fact," the Court was quoting the Florida statute, not pronouncing a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond-a-reasonable-doubt standard. *Accord People v. Jones*, 3 Cal. 5th 583, 220 Cal. Rptr. 3d 618, 398 P.3d 529, 554 (Cal. 2017); *Leonard v. State*, 73 N.E.3d 155, 169 (Ind. 2017); *Evans v. State*, 226 So. 3d 1, 39 (Miss. 2017). Were there any doubt on this point, it was eliminated roughly a week after *Hurst* when the Court

announced *Kansas v. Carr*, 577 U.S. __, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). There, the Court made the same observations regarding the weighing process as this court had in *Nunnery*—that it was inherently a moral question which could not be reduced to a cold, hard factual determination. *Id.* at 642; *Nunnery*, 127 Nev. at 775, 263 P.3d at 252 ("[T]he weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum." (alteration in original) (quoting [**25] *Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002))).

Moreover, 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. Adv. Rep. 39, 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)). We explained that a defendant is death-eligible, as the term is used for the purposes of the narrowing requirement amenable to the beyond-a-reasonable-doubt standard, so long as the jury finds the elements of first-degree murder and the existence of one or more aggravating circumstances. *Id.* Once the State has proven first-degree murder and one statutorily defined aggravating circumstance beyond a reasonable doubt, each juror is tasked with determining whether to impose a death sentence. *Id.* While Nevada law provides that the jury may *not* impose a death sentence if the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3) ("The jury may impose a sentence [**26] 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."), this does not transform the weighing component into a factual determination. Even if it did, we agree with the Court that it would be pointless to instruct that the jury must, or even that it could, make that determination beyond a reasonable doubt. *Carr*, 577 U.S. at __, 136 S. Ct. at 642. We thereby reject the argument that the instruction in this case was unconstitutional.

Nevada's death penalty scheme

Jeremias argues that Nevada's death penalty scheme is unconstitutional on three grounds. First, he argues that it does not adequately narrow the class of persons eligible for the death penalty. Other than making speculative inferences from old statistics, he provides no citation, authority, or analysis of the issue, including no discussion of the aggravating circumstances outlined in NRS 200.033. This court has previously rejected generalized assertions that the death penalty is unconstitutional, *see Rhyne v. State*, 118 Nev. 1, 14, 38 P.3d 163, 172 (2002), and we do so here. Second, he argues that the death penalty constitutes cruel and unusual punishment. His argument is not supported [**27] by any cogent argument or authority, and we decline to consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Third, he argues that executive clemency does not exist. Clemency is not required to make a death penalty scheme constitutional. *Niergarth v. State*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989).

Regardless, clemency is available through the pardons board. *Colwell [*55] v. State*, 112 Nev. 807, 812, 919 P.2d 403, 406-07 (1996).

Cumulative error

Jeremias asserts that cumulative error deprived him of due process. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error). We conclude that he fails to meet his burden of demonstrating that he is entitled to relief. Although we have identified several arguable errors, they occurred at different portions of the proceedings (jury selection, the guilt phase, and the penalty phase). Jeremias offers no explanation as to whether, or how, this court should cumulate errors across different phases of a criminal trial. Nor does he explain whether, or how, this court should cumulate errors he forfeited with errors he preserved. *See, e.g., United States v. Barrett*, 496 F.3d 1079, 1121 n.20 (10th Cir. 2007) (recognizing a split in authority as to cumulative error analysis when plain errors are implicated and declining to resolve "how to, if at all, incorporate into the cumulative error analysis plain errors that do not, standing alone, necessitate reversal")-Jeremias simply asserts that he incorporates [**28] all of the claims and that reversal is warranted. This is insufficient, and we reject the claim.

Mandatory review of Jeremias' death sentences

NRS 177.055(2) requires this court to determine whether the evidence supports the aggravating circumstances, whether the verdict of death was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the death sentence is excessive considering this defendant and the crime.

The jury found three aggravating circumstances regarding each murder: (1) the murder was committed in the course of a robbery, (2) the murder was committed to prevent a lawful arrest, and (3) the defendant was convicted of more than one murder in the proceeding. The first aggravating circumstance is supported by the evidence in that the victims' property was taken, Zapata testified that there was a plan to commit robbery, and Jeremias admitted that he took the victims' property. The second aggravating circumstance is also supported by the evidence: there was no reason to kill the victims other than to prevent them from reporting the robbery; further, Zapata testified that Jeremias said he did not need to wear a mask because the victims would know who he was, which [**29] suggests he killed them to avoid identification and thus arrest. The third aggravating circumstance is supported by the verdict itself. We conclude that the evidence supports the finding of the aggravating circumstances.

We also conclude that the death sentences are not excessive, nor were they imposed under the influence of passion, prejudice, or any arbitrary factor. Although we reiterate our concern with the prosecutor's comments during the penalty phase, we do not believe they improperly influenced the verdict in light of the totality of the circumstances. We recognize that Jeremias was relatively young at the time of the crime. And although the jury found as a mitigating circumstance that he was under the influence of a controlled substance during the murders, there is no evidence that he committed them because of his youth or because he was intoxicated; that he acted based on uncontrollable, irrational, or delusional impulses; or that the

murders occurred during an emotionally charged confrontation. Instead, the evidence reflects advance planning and cold, deliberate calculation. Jeremias killed two people he claimed were his friends for a small amount of money, some marijuana, [**30] and laptop computers. He apparently knew going into the apartment that he would kill the victims. Shortly after the murders, Jeremias went out celebrating, apparently unaffected by the acts he had just committed. Putting all of this together, we conclude that the death sentences are supported by our review of the record pursuant to NRS 177.055(2).

We therefore affirm.

Stiglich, J.

Stiglich

We concur:

Douglas, C.J.

Douglas

Gibbons, J.

Gibbons

[*56] Pickering, J.

Pickering

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

End of Document

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH SIMON JEREMIAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67228

FILED

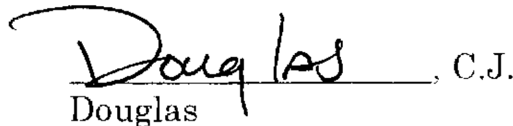
APR 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

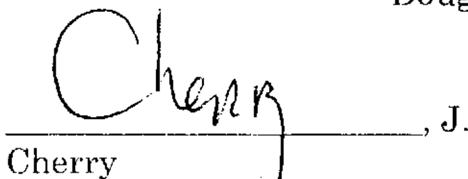
ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c). This court considered and rejected claim "I" of appellant's opening brief. Appellant acknowledged that this court held in *Summers v State*, 122 Nev. 1326, 148 P.3d 778 (2006), that *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to evidence admitted during a capital penalty trial, and we decline his invitation to overrule *Summers*.

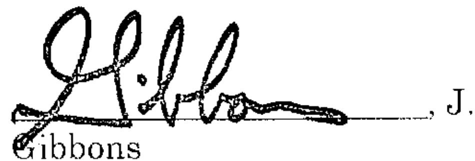
It is so ORDERED.



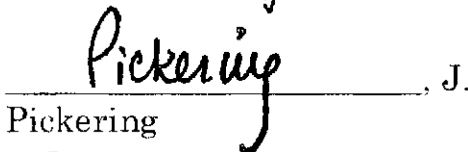
_______, C.J.
Douglas



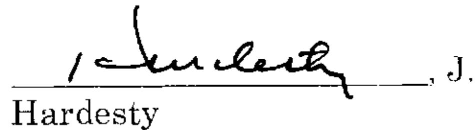
_______, J.
Cherry



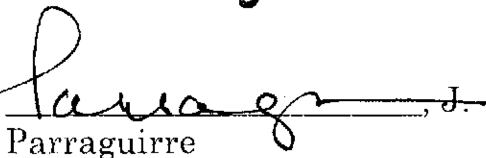
_______, J.
Gibbons



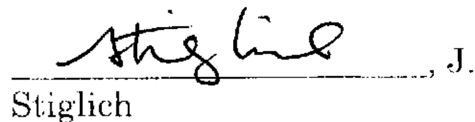
_______, J.
Pickering



_______, J.
Hardesty



_______, J.
Parraguirre



_______, J.
Stiglich

18-16095

cc: Hon. Valerie Adair, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Summers v. State

Supreme Court of Nevada

December 28, 2006, Decided

No. 45683

Reporter

122 Nev. 1326 *; 148 P.3d 778 **; 2006 Nev. LEXIS 149 ***; 122 Nev. Adv. Rep. 112

CHARLES ANTHONY SUMMERS, Appellant, vs. THE STATE OF NEVADA, Respondent.

Subsequent History: Post-conviction proceeding at Summers v. State, 2009 Nev. LEXIS 1906 (Nev., Aug. 25, 2009)

Writ of habeas corpus dismissed Summers v. McDaniels, 2010 U.S. Dist. LEXIS 122736 (D. Nev., Nov. 17, 2010)

Writ of habeas corpus denied Summers v. State, 2012 Nev. Unpub. LEXIS 458 (2012)

Prior History: [***1] Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and assault with the use of a deadly weapon, and from sentences of life in prison without the possibility of parole after a capital penalty hearing. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Disposition: Affirmed.

Counsel: David M. Schieck, Special Public Defender, and Lee Elizabeth McMahon, Deputy Special Public Defender, Clark County, for Appellant.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and James Tufteland and Steven S. Owens, Chief Deputy District Attorneys, Clark County, for Respondent.

Judges: ROSE, C.J., with whom MAUPIN and DOUGLAS, JJ., agreed, dissented in part. BECKER, GIBBONS and PARRAGUIRRE, JJ., concur.

Opinion by: HARDESTY

Opinion

[*1327] [**779] BEFORE THE COURT EN BANC.

By the Court, HARDESTY, J.:

We primarily consider in this appeal whether the Confrontation Clause of the Sixth Amendment to the United States Constitution and the United States Supreme Court's holding in *Crawford v.*

Washington [1] apply to evidence admitted during a capital penalty hearing. [***2] We conclude that they do not apply. We conclude that this issue, along with the others appellant Charles Summers raises on appeal, does not warrant reversal of his conviction and sentence. Therefore, we affirm.

FACTS

Guilt phase

Summers was an illegal drug dealer. Sometime in 2003, he entered into an informal agreement with Frederick Ameen, an addict who owed him money. Summers agreed to provide Ameen [*1328] with drugs to sell, primarily "crack" cocaine, and to pay for a motel room from which he could sell the drugs; Ameen was to give Summers the profits from the sales.

On the night of December 28 and early morning of December 29, 2003, Ameen and his associate Albert Paige were in a room at the La Palm Motel in Las Vegas that Summers had rented for Ameen to sell illegal drugs in accordance with their agreement. Summers warned Ameen that only certain people were to be allowed in the motel room. That night, Ameen and Paige were in the room smoking crack cocaine [***3] with three other people, one of whom was Donna Thomas, a prostitute and friend of Ameen. When Summers later arrived accompanied by Andrew Bowman, he was upset about the number of people in the room. Ameen told everyone to leave; Paige and Thomas stayed behind.

Bowman briefly left the motel room, but he soon returned and handed Summers a .38 caliber handgun. [2] Summers stood in front of Ameen and Thomas, who were sitting on a bed. Paige was sitting at a small table, and [**780] Bowman stood by the door. Summers put on a small glove and resituated the handgun, which was in the pouch of his sweater. Summers told Paige that if he wanted to kill him that he would have, but that Paige was playing him "for some type of fool."

Summers pulled out the handgun, pointed it at Thomas, and asked Ameen who she was. Ameen explained to Summers that Thomas was a friend, that he had told Thomas about Summers, and [***4] that he had instructed her to let Summers enter the motel room. Summers asked Thomas if she knew who he was. Thomas replied in the negative. Ameen reminded Thomas that he had previously told her about Summers. Thomas began to speak when Summers shot her.

Summers then pointed the handgun directly at Paige and pulled the trigger. But the handgun misfired. Summers then pointed the handgun at Ameen, but Ameen did not see Summers pull the trigger. Summers and Bowman then left the room. Thomas later died from the gunshot wound.

---

[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[2] Bowman testified at trial that Summers actually had the handgun when the two initially entered the motel room.

Summers was arrested for the incident and charged with several crimes. The State filed a notice of intent to seek a death sentence. The guilt phase of Summers's jury trial began on March 28, 2005. Summers contended in his defense that it was Ameen who shot Thomas, not him. To support this theory, Summers called a former gang member incarcerated at the Lovelock Correctional Center, Terrence Lee Collins, who testified that he had previously purchased crack cocaine from Summers and that Ameen once confessed to him that he shot Thomas. He also testified that Ameen and Paige had devised a theory to blame Thomas's murder on [*1329] Summers. Summers also presented evidence [***5] that an anonymous tip to the police blamed Thomas's murder on another man and identified Ameen as an accomplice to the crime.

After a four-day trial, the jury found Summers guilty of the first-degree murder of Thomas with the use of a deadly weapon, the attempted murder of Paige with the use of a deadly weapon, and of assaulting Ameen with the use of a deadly weapon.

Penalty hearing

Prior to the penalty hearing, Summers moved to bifurcate the hearing into eligibility and selection phases. The district court denied the motion without explanation.

During the one-day penalty hearing, the State first presented victim-impact evidence from Thomas's sister and father. They testified that Thomas was the mother of three children, two girls and a boy, and had worked hard to support them before she moved to Las Vegas and "got caught up in life."

The State then presented numerous witnesses who testified about Summers's juvenile and adult criminal history while both in and out of custody, as well as exhibits containing approximately 835 pages of documents regarding that history. These documents included: Las Vegas Metropolitan Police Department (LVMPD) records and arrest [***6] reports; a 1996 judgment of conviction for robbery and possession of a stolen vehicle; juvenile and family court records; LVMPD gang unit investigation cards; and Clark County Detention Center and Nevada Department of Correction (NDOC) records, which included inmate disciplinary reports.

LVMPD Officer Patrick Rooney testified that Summers was arrested as a juvenile in 1992 for hitting a woman in the head with a bottle. LVMPD Detective Patrick Paorns testified that Summers was also arrested that year for his participation in a carjacking with the use of a deadly weapon. LVMPD Officer Brian Morse testified that Summers was arrested three years later in 1995 as a juvenile for robbery--stealing a woman's purse--and possession of a stolen vehicle. LVMPD Officer Timothy Schoening testified that Summers was also arrested that year for beating a man with a bottle. LVMPD Officer Clayton Shanor testified about Summers's disciplinary problems while incarcerated, including fighting and verbal outbursts.

LVMPD Officer Andrew Pennucci testified that he stopped Summers in 2003 for jaywalking. During the stop, Summers turned away from Officer Pennucci and reached beneath his jacket into [***7] his waistband. Officer Pennucci testified that he ordered Summers [**781] to stop, but Summers did not comply. Officer Pennucci drew his handgun, pointed it at Summers, and ordered Summers to take his hand from his waistband. Summers complied and said, "Okay.

Okay. I have a gun." Officer Pennucci seized a loaded .22 caliber [*1330] semiautomatic handgun with a bullet in the chamber from Summers. Summers was arrested for the incident.

Summers's former juvenile probation officer, Gregory Stanphill, testified that Summers was a very sophisticated juvenile. And LVMPD Officer Thomas Bateson testified about Summers's gang affiliations. Several other witnesses, including the Warden of Camps for the NDOC, testified that Summers was a discipline problem while he was in custody.

Summers called several family members to testify on his behalf: his uncle, nephew, second cousin, grandmother, and sister. They testified that Summers was the youngest of three children, his mother and father drank alcohol and used illegal drugs, and his father sometimes beat his mother. Summers's mother and father had since died. Summers had an impoverished childhood, sometimes not having enough food to eat and going to school [***8] in dirty clothes. The members of his family also testified about their love for Summers, his belief in God, and how they would write to him while he was in prison. Summers had asked to be removed from the courtroom prior to the start of the hearing and, therefore, did not make a statement in allocution.

The State finally called NDOC Officer Jeffery Moses, who had arrived at the hearing late because of a delayed airline flight. Officer Moses testified that he found a six-inch-long weapon in Summers's prison cell in 1997 and that Summers took responsibility for having it.

The jury found four circumstances aggravated the murder. Three of the aggravators were found pursuant to NRS 200.033(2)--that the murder was committed by a person who had been convicted of a felony involving the use or threat of violence. These three aggravators were based on Summers's 1996 conviction for robbery and instant convictions for assault with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The other aggravator was found pursuant to NRS 200.033(3)--that the murder was committed by a person who knowingly created a [***9] great risk of death to more than one person.

The jury found six mitigating circumstances: the absence of parental guidance; impoverished living conditions and environment; pressured into gang activity; mentors were criminals, gang members, and drug dealers; lack of recommended psychological treatment; and a continuing supportive family. The jurors concluded that the aggravating circumstances outweighed the mitigating but imposed upon Summers a sentence of life without the possibility of parole for Thomas's murder.

The district court later entered a judgment of conviction on June 30, 2005, sentencing Summers to two consecutive terms of life in prison without the possibility of parole for the first-degree murder with the use of a deadly weapon, and various concurrent and consecutive terms for the attempted murder and assault convictions. [*1331] When Summers was asked by the district court during sentencing if he had anything to say, Summers replied, "It is what it is." This appeal followed.

DISCUSSION

I. *Application of the Confrontation Clause and Crawford v. Washington to a capital penalty hearing*

Summers contends that the Confrontation Clause and *Crawford* [***10] apply to a capital penalty hearing and therefore the admission of nearly 835 pages of documentary exhibits containing testimonial hearsay violated his right to confrontation. [3] We disagree.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses [**782] against him." The United States Supreme Court held in its 2004 opinion *Crawford* that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her. [4]

[***11]

We have never fully addressed the relevance of the Confrontation Clause in a capital penalty hearing. This court recognized in *Lord v. State* [5] that the right to confrontation applies in capital penalty hearings in one respect: admitting a nontestifying codefendant's confession generally violates a defendant's right to confrontation under *Bruton v. United States*. [6] *Lord* addressed only the *Bruton* question and did not otherwise explore the right to confrontation at a capital penalty hearing. [7] We limit *Lord* to its facts.

Guiding our decision today is the Supreme Court's 1949 opinion *Williams v. New* [***12] *York*. [8] The Court recognized in *Williams* that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." [9] The Court rejected the contention [*1332] that a death sentence based on information from witnesses

---

[3] The State contends that this issue was improperly preserved for our review. Although Summers's objections to the admission of the documents were less than specific, we conclude that they were sufficient to preserve this issue for our review.

[4] 541 U.S. at 68-69.

[5] 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991).

[6] 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[7] *Cf. Kaczmarek v. State*, 120 Nev. 314, 335-36, 91 P.3d 16, 31 (2004) (concluding that barring a defendant from cross-examining a witness regarding her opinion on the proper sentence during a capital penalty hearing did not violate the Sixth Amendment).

[8] 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

[9] *Id.* at 250.

whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. [10]

Williams has since been relied upon for the proposition that the Confrontation Clause does not apply to capital sentencing. [11] Although the continuing viability of *Williams* has been called into question, [12] in our view, and that of the Ninth Circuit Court of Appeals, it remains good law. [13] *Crawford* did not overrule *Williams*. [14] [***14] Indeed, the Supreme [***13] Court has yet to address whether its opinion in *Crawford* has any bearing on any sentencing proceedings, capital or otherwise. [15]

The Court in *Crawford* indicated no intent or basis to extend the Sixth Amendment to capital penalty hearings. No federal circuit courts of appeals have extended *Crawford* to a capital penalty hearing, and the weight of authority is that *Crawford* does not apply to a noncapital sentencing proceeding. [16]

[**783] [***15]

---

[10] *Id.* at 242-52.

[11] *See, e.g., Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (citing *Williams* for the proposition that "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing"); *Bassette v. Thompson*, 915 F.2d 932, 939 (4th Cir. 1990); *see also U.S. v. Littlesun*, 444 F.3d 1196, 1198-1200 (9th Cir. 2006) (citing *Williams* in holding that *Crawford* did not alter its jurisprudence that hearsay is generally admissible at noncapital sentencing), *cert. denied*, 549 U.S. 885, 127 S. Ct. 248 (2006).

[12] *See U.S. v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006); *Maynard v. Dixon*, 943 F.2d 407, 414 n.5 (4th Cir. 1991) (recognizing that conflicting authority exists as to whether the Confrontation Clause applies in capital penalty hearings).

[13] *See Littlesun*, 444 F.3d at 1200.

[14] *Id.*

[15] *See U.S. v. Katzopoulos*, 437 F.3d 569, 574 (6th Cir. 2006) ("An issue unaddressed by *Crawford* is whether the Sixth Amendment right to confront witnesses applies similarly at sentencing.").

[16] *See, e.g., U.S. v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *U.S. v. Martinez*, 413 F.3d 239, 242-43 (2d Cir. 2005), *cert. denied*, 546 U.S. 1117, 126 S. Ct. 1086, 163 L. Ed. 2d 902 (2006); *U.S. v. Stone*, 432 F.3d 651 (6th Cir. 2005), *cert. denied*, 549 U.S. 821, 127 S. Ct. 129 (2006); *U.S. v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005), *cert. denied*, 546 U.S. 1024, 126 S. Ct. 671, 163 L. Ed. 2d 541 (2005); *U.S. v. Brown*, 430 F.3d 942, 943-44 (8th Cir. 2005); *Littlesun*, 444 F.3d at 1199-1200; *U.S. v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005).

We have recognized that under NRS 175.552(3) hearsay is generally admissible [17] in a capital penalty hearing. [18] Absent controlling [*1333] authority overruling *Williams* and extending the proscriptions of the Confrontation Clause and *Crawford* to capital penalty hearings in Nevada, we are not persuaded to depart from our prior jurisprudence and extend to capital defendants confrontation rights under *Crawford*.

We therefore conclude that neither the Confrontation Clause nor *Crawford* apply to evidence admitted at a capital penalty hearing and the decision in *Crawford* [***16] does not alter Nevada's death penalty jurisprudence. Because Summers did not enjoy a right to cross-examine [19] the declarants who were the source of alleged testimonial hearsay within documentary exhibits admitted at his capital penalty hearing, he has shown no error occurred on this issue.

The concurring and dissenting justices in this appeal would extend the Supreme Court's holdings in *Ring v. Arizona* [20] and *Crawford* and hold that the right to confrontation applies to the jury's eligibility determination in a capital sentencing proceeding. Notwithstanding this conclusion, however, the separate concurring and dissenting opinion recognizes that the Confrontation Clause does not apply to the jury's deliberations with respect to the penalty that should [***17] be imposed on a defendant whom the jury has found to be death eligible. Even assuming that our dissenting and concurring colleagues have correctly foreseen that the Supreme Court will someday hold that *Crawford* and the Confrontation Clause are applicable to the eligibility phase of a capital sentencing proceeding, in our view, Nevada's capital sentencing scheme permitting unbifurcated penalty hearings would remain constitutionally viable. We submit that such a holding would not require penalty hearings to be fragmented into phases where the jury separately considers and answers the factual questions relating to whether: (1) the alleged aggravating and mitigating circumstances have been established, (2) the aggravating circumstances outweigh any mitigating circumstances, and (3) the penalty of death should actually be imposed on a defendant whom the jury has found to be death eligible.

---

[17] Evidence must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh its probative value. *See Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); *Parker v. State*, 109 Nev. 383, 390-91, 849 P.2d 1062, 1066-67 (1993).

[18] *See Thomas v. State*, 114 Nev. 1127, 1147, 967 P.2d 1111, 1124 (1998).

[19] But this court has recognized in *Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1048-49 (1990), a limited right to cross-examination during a criminal sentencing proceeding. Our decision today does not overrule *Buschauer*.

[20] 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

In this, we note that this court generally presumes that juries follow district [***18] court orders and instructions. [21] [***19] In *Tavares v. State*, [22] for example, this court implicitly recognized that jurors are intellectually [*1334] capable of properly following instructions regarding the limited use of prior bad act evidence. If jurors can perform an act of intellectual discrimination permitting consideration of prior bad act evidence for one purpose, but not for another, they are most certainly intellectually capable of following a clear instruction directing that they must refrain from considering testimonial hearsay in deciding a capital defendant's death eligibility, but that they may nonetheless consider such evidence in deciding whether to actually impose a death sentence on a defendant whom they found eligible to receive it. [23] Our view in this [**784] respect is confirmed by the fact that the jurors in the instant case found the aggravating circumstances outweighed the mitigating circumstances but did not sentence Summers to death. Thus, the jury's verdict in this case clearly evinces the jury's capability to intellectually discriminate between the types of evidence presented and to impose a just sentence.

II. *Other claims raised by Summers on appeal*

In addition to his Confrontation Clause and *Crawford* claim, Summers raises four other claims on appeal. We have carefully reviewed each of these claims, and we conclude that they do not warrant any relief.

First, Summers contends that juror 661 was biased because one of the prosecutors once dated her daughter. However, Summers did [***20] not challenge juror 661 for cause, and our review of her examination during voir dire does not reveal that she was biased or improperly seated in violation of his constitutional right to a fair and impartial jury. [24]

Second, Summers contends that the district court committed judicial misconduct and failed to exercise self-restraint and impartiality during his counsel's cross-examination of State witness Albert Paige by interpreting Paige's answers and failing to admonish Paige for answering questions with questions. However, the cross-examination of Paige was contentious, and the

---

[21] *See Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

[22] 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[23] *See also Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (statements elicited from a defendant in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), can be used to impeach the defendant's credibility, even though they are inadmissible as evidence of guilt, so long as the jury is instructed accordingly); *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (evidence of a defendant's prior convictions could be introduced for purposes of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt).

[24] *See Weber*, 121 Nev. 554, 585, 121 Nev. 554, 119 P.3d 107, 125 (2005); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 313, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

district court [*1335] was acting to maintain control over the trial and did so without clear objection from Summers. [25]

[***21] Third, Summers contends that the district court abused its discretion by denying separate motions for a mistrial. One motion was made during the guilt phase based on a statement by State witness Frederick Ameen regarding threats to his life. However, this statement was not elicited by the State, and the district court ordered it stricken. The other motion was made during the penalty hearing and was based on several instances of alleged prosecutorial misconduct. We discern no misconduct in the instances cited by Summers on appeal. Summers has failed to demonstrate the district court abused its discretion by denying either of his mistrial motions. [26]

Finally, Summers contends that he was denied a fair trial because of cumulative error. [27] For the reasons already discussed above, we conclude that Summers is not entitled to relief on this claim or any other he raises on appeal.

[***22] *CONCLUSION*

Neither the Confrontation Clause nor *Crawford* extends to evidence admitted during a capital penalty hearing. We conclude that this issue, along with the others Summers raises, does not warrant reversal of his conviction or sentence. We affirm.

BECKER, GIBBONS and PARRAGUIRRE, JJ., concur.

Concur by: ROSE (In Part)

Dissent by: ROSE (In Part)

Dissent

ROSE, C.J., with whom MAUPIN and DOUGLAS, JJ., agree, concurring in part and dissenting in part:

---

[25] *See Oade v. State*, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998) (holding that "[a] trial judge has a responsibility to maintain order and decorum in trial proceedings" and allegations of "[j]udicial misconduct must be preserved for appellate review").

[26] *See Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

[27] *See Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.").

Although I agree with the majority that Summers is not entitled to relief, I dissent in regard to the majority's conclusion that the Confrontation Clause and *Crawford v. Washington* [1] [***23] do not apply to capital penalty hearings. The majority opinion relies on a fifty-seven-year-old [**785] United States Supreme Court case that was decided well before any of the United States Supreme Court's more recent death penalty pronouncements. The United States Supreme Court [*1336] has not addressed this precise issue but has given very clear indications that *Williams v. New York* [2] is no longer viable. I elect to follow those clear indications.

The Sixth Amendment to the United States Constitution provides that a criminal defendant enjoys the right "to be confronted with the witnesses against him." *Crawford* holds that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. [3] The Supreme Court has yet to address whether *Crawford* has any bearing on sentencing proceedings or capital penalty hearings, [4] which, as discussed below, are not equivalent.

This court has already recognized that the right to confrontation applies [***24] in capital penalty hearings in at least one respect. In *Lord v. State*, we held that admission of a nontestifying codefendant's confession generally violates a defendant's right to confrontation. [5] *Lord* did not otherwise explore the scope of the right to confrontation at a capital penalty hearing. [6]

[***25]

Further exploration of this question requires the initial recognition that a capital penalty hearing has two distinct aspects: an eligibility phase and a selection phase. The Supreme Court has identified and described these two aspects. [7] During the eligibility phase, "the jury narrows the

---

[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[2] 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

[3] 541 U.S. at 68-69.

[4] *See U.S. v. Katzopoulos*, 437 F.3d 569, 574 (6th Cir. 2006) ("An issue unaddressed by *Crawford* is whether the Sixth Amendment right to confront witnesses applies similarly at sentencing.").

[5] 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991) (applying *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

This court has also recognized a limited right to cross-examination during a criminal sentencing proceeding. *See Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1048-49 (1990) (holding that where a victim-impact statement refers to specific prior acts of the defendant, due process requires, among other things, an opportunity to cross-examine the accuser, but declining to bar all hearsay evidence in an impact statement).

[6] *Cf. Kaczmarek v. State*, 120 Nev. 314, 335-36, 91 P.3d 16, 31 (2004) (concluding that barring a defendant from cross-examining a witness regarding her opinion on the proper sentence during a capital penalty hearing did not violate the Sixth Amendment).

[7] *Buchanan v. Angelone*, 522 U.S. 269, 275, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998).

class of defendants eligible for the death penalty." [8] In the selection phase, "the jury determines whether to impose a death sentence on an eligible defendant." [9] [*1337] Moreover, the Supreme Court accords these two phases "differing constitutional treatment." [10] [***26]

> It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. [11]

This court has similarly distinguished two aspects of a capital penalty hearing, specifically in regard to the jury's treatment of evidence. Although NRS 175.552(3) provides broadly that during a penalty hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence," the last type of evidence--"other matter" evidence--is not admissible to determine death eligibility.

> "Other matter" evidence is *not* admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances. [**786] Such use of this evidence would undermine the constitutional narrowing process which the enumeration and weighing of specific aggravators is designed to implement. [12]

[***27] Therefore, jurors may consider "other matter" evidence only in the selection phase, after they have determined whether the defendant is eligible for a death sentence. [13]

As I will explain, a defendant is entitled to confront the witnesses against him in the eligibility phase of a capital penalty hearing because it is during this phase that the jury must determine whether the elements of capital murder have been established.

The majority observes that hearsay evidence is generally admissible in a capital penalty hearing under NRS 175.552(3), but such a statutory provision must yield to any contrary requirement under the Confrontation Clause. The majority also relies on the Supreme Court's 1949 decision in *Williams v. New York*, which rejected the contention that a death sentence based on information from [*1338] witnesses whom the defendant had not been permitted to confront

---

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 275-76.

[12] *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000) (citation omitted); *see also Evans v. State*, 117 Nev. 609, 635-37, 28 P.3d 498, 516-17 (2001).

[13] *Hollaway*, 116 Nev. at 746, 6 P.3d at 997.

violated the Due Process Clause of the [***28] Fourteenth Amendment of the United States Constitution. [14] The Court was concerned that sentencing judges would lose access to a good deal of relevant information if they could only consider information "given in open court by witnesses subject to cross-examination." [15] *Williams*, however, is nearly 60 years old and is no longer authoritative given the Supreme Court's subsequent jurisprudence.

The Supreme Court has not directly addressed this issue since *Williams*. In pre-*Crawford* decisions, the Seventh and the Fourth Circuit Courts of Appeals have relied on *Williams* in concluding that the Confrontation Clause does not apply to capital penalty hearings. [16] Other federal courts have not considered the matter to be so settled, [17] [***30] and the Eleventh Circuit Court of Appeals has recognized a right to cross-examination at capital penalty hearings. [18] In other decisions predating *Crawford*, state courts have [***29] also reached differing conclusions on whether the Sixth Amendment right to confrontation applies to capital penalty hearings. [19]

The majority emphasizes that the Supreme Court has not overruled *Williams*. But this does not justify rigid adherence to *Williams* given the undeniable evolution of the Court's jurisprudence on this matter over the succeeding decades as well as the weight of authority from other courts that have reached this issue. *Williams* [***31] long predates the Supreme Court's many decisions since 1976 that recognize that death is different; these decisions have [*1339] established separate [**787] penalty hearings in capital cases [20] [***32] and afforded a number of

---

[14] 337 U.S. 241, 242-52, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

[15] *Id.* at 250.

[16] *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (citing *Williams* for the proposition that "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing"); *Bassette v. Thompson*, 915 F.2d 932, 939 (4th Cir. 1990).

[17] *See Maynard v. Dixon*, 943 F.2d 407, 414 n.5 (4th Cir. 1991) (recognizing that conflicting authority exists as to whether the Confrontation Clause applies in capital penalty hearings); *United States v. Lee*, 374 F.3d 637, 649-50 (8th Cir. 2004) (addressing whether appellant's confrontation rights were violated during his capital penalty hearing where the government did not contest that he had such rights); *U.S. v. Hall*, 152 F.3d 381, 406 (5th Cir. 1998) (assuming, without deciding, "that the Confrontation Clause applies to the sentencing phase of a capital trial"), *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).

[18] *U.S. v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006); *Proffitt v. Wainwright*, 706 F.2d 311 (11th Cir. 1983) (concluding that the Confrontation Clause extends to capital penalty hearings in regard to the right to cross-examine the author of a psychiatric report; limiting its holding in *Proffitt v. Wainwright*, 685 F.2d 1227, 1251-55 (11th Cir. 1982)).

[19] *Compare, e.g.*, *Sivak v. State*, 112 Idaho 197, 731 P.2d 192, 211 (Idaho 1986) (holding that a capital defendant does not have confrontation rights in a penalty hearing), *and State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6, 15-16 (Wash. 1982), *with Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985).

[20] *See Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (stating that concerns that the death penalty not be imposed in an arbitrary or capricious manner "are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information").

constitutional safeguards in those hearings. [21] In 1983, the Supreme Court justified its conclusion that expert testimony on future dangerousness is admissible at a capital penalty hearing by recognizing that "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, *who would have the benefit of cross-examination* and contrary evidence by the opposing party." [22] Given all this subsequent case law, *Williams*'s conclusion that no distinction need be made between capital penalty hearings and noncapital sentencing proceedings [23] is no longer viable. [24]

Indeed, in *Specht v. Patterson* [***33] in 1967, the Supreme Court expressly declined to extend *Williams* to a "radically different situation" and held that the right to confrontation, among others, applied at a sentencing hearing where the sentence might be based on "a new finding of fact." [25] In 1981, the Court noted the similarity between the sentencing hearing in *Specht* and a capital penalty hearing. [26] And in 2002 in *Ring v. Arizona*, the Court held that aggravating circumstances function as elements of capital murder and under the Sixth Amendment right to a jury trial, must be found by jurors, not judges. [27] Consequently, *Specht* and *Ring* are more apposite than *Williams* to the issue of the Confrontation Clause's application to the eligibility phase of a capital penalty hearing.

Given the trend in the Supreme Court's decisions over the last four decades and its specific holdings [***34] in *Ring* and *Crawford*, I conclude [*1340] that the Sixth Amendment right to confrontation applies to evidence presented during the eligibility phase of a capital penalty hearing. This conclusion is supported by a number of other judicial decisions by both state courts [28] and federal district courts. [29]

---

[21] *E.g., Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (holding that the Sixth Amendment requires a jury to find the facts rendering a defendant eligible for death); *Bullington v. Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) (holding that the Double Jeopardy Clause applies to capital penalty decisions); *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (plurality opinion) (holding that due process was denied when a death sentence was based in part on information that a defendant had no opportunity to deny or explain).

[22] *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (emphasis added).

[23] *See* 337 U.S. at 251.

[24] *See Hatch v. State of Okl.*, 58 F.3d 1447, 1465 (10th Cir. 1995) ("The Court has since discredited some of the logic that undergirded its decision in *Williams*."), *overruled in part on other grounds by Daniels v. U.S.*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001).

[25] 386 U.S. 605, 608-10, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

[26] *See Bullington*, 451 U.S. at 446.

[27] 536 U.S. at 609.

[28] *See State v. McGill*, 213 Ariz. 147, 140 P.3d 930, 942 (Ariz. 2006) (recognizing that confrontation rights extend to the aggravation phase, but not to the penalty phase, of a bifurcated capital penalty hearing); *Rodgers v. State*, 948 So. 2d 655, 2006

[***35]

On the other hand, I see no basis in either *Ring* or *Crawford* to extend the Sixth Amendment [**788] confrontation right to the selection phase of a capital penalty hearing. [30] [***36] As stated above, the Supreme Court has accorded the two aspects of capital penalty hearings "differing constitutional treatment," [31] stressing "the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment" only in regard to the eligibility phase, while permitting "broad inquiry" in the selection phase. [32] The selection phase of a capital penalty hearing is analogous to a noncapital sentencing hearing, where the sentencer decides the actual sentence based on the offense, which has already been established, and its accompanying sentencing parameters. [33] And the weight of authority is that the Confrontation Clause and *Crawford* do not extend to noncapital sentencing proceedings. [34] I [*1341] therefore conclude that the right to confrontation does not apply to evidence presented during the selection phase of a capital penalty hearing.

[***37] In this case, however, the penalty hearing was conducted in a single proceeding, without any bifurcation of the eligibility and selection phases. So the issue is how to apply the Confrontation Clause and *Crawford* to such an unbifurcated capital penalty hearing.

This court has never required bifurcated proceedings in capital penalty hearings. [35] Yet we have also never precluded district courts from bifurcating penalty hearings, and district courts certainly have the discretion to do so. Indeed, bifurcation is the better practice since it prevents the

---

WL 3025668, at *4-6 (2006); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), *cert. denied*, 548 U.S. 926, 126 S. Ct. 2982, 165 L. Ed. 2d 989 (2006).

[29] *See U.S. v. Johnson*, 378 F. Supp. 2d 1051, 1060-62 (N.D. Iowa 2005) (applying confrontation rights to the eligibility phase); *U.S. v. Bodkins*, 2005 U.S. Dist. LEXIS 8747, 2005 WL 1118158, at *4-5 (W.D. Va. May 11, 2005) (same); *U.S. v. Jordan*, 357 F. Supp. 2d 889, 902-03 (E.D. Va. 2005) (same); *see also U.S. v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal 2006) (applying confrontation rights to all phases of a capital penalty hearing).

I am aware of but one court since *Ring* and *Crawford* that has reached a result that may be contrary to this conclusion. *See Call v. Polk*, 454 F. Supp. 2d 475, 501-04 (W.D.N.C. 2006) (concluding that a state court did not render a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court).

[30] *Ring*, 536 U.S. at 597 n.4 (noting that Ring did not argue the Sixth Amendment required the jury to determine whether to impose death and that the plurality opinion in *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), observed that such a requirement has never been suggested).

[31] *Buchanan*, 522 U.S. at 275.

[32] *Id.* at 275-76; *cf. Hollaway*, 116 Nev. at 746, 6 P.3d at 997.

[33] Selection-phase evidence, of course, to be admissible must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh the probative value of the evidence. *See Hollaway*, 116 Nev. at 746, 6 P.3d at 997; *Parker v. State*, 109 Nev. 383, 390-91, 849 P.2d 1062, 1066-67 (1993).

[34] *See, e.g.*, *U.S. v. Stone*, 432 F.3d 651 (6th Cir. 2005), *cert. denied*, 549 U.S. 821, 127 S. Ct. 129 (2006); *U.S. v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005), *cert. denied*, 546 U.S. 1024, 126 S. Ct. 671, 163 L. Ed. 2d 541 (2005); *U.S. v. Brown*, 430 F.3d 942, 943-44 (8th Cir. 2005); *U.S. v. Littlesun*, 444 F.3d 1196, 1199-1200 (9th Cir. 2006), *cert. denied*, 549 U.S. 885, 127 S. Ct. 248 (2006).

[35] *Johnson v. State*, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002); *see also Weber v. State*, 121 Nev. 554, 584, 121 Nev. 554, 119 P.3d 107, 128 (2005); *McConnell v. State*, 120 Nev. 1043, 1061-62, 102 P.3d 606, 619 (2004).

possibility that jurors will be improperly influenced by "other matter" evidence in determining the existence and the weight of aggravating circumstances and mitigating circumstances. And bifurcation is also better because it provides two distinct proceedings in which the right to confrontation first applies and then does not apply. Given the practical difficulties that arise when the two aspects of a penalty hearing are not separated into distinct proceedings, I would hold that when a capital penalty hearing is not bifurcated, the Confrontation Clause and *Crawford* must apply to the entire hearing.

[***38] When a capital penalty hearing is bifurcated, the eligibility phase remains insulated from the broad range of "other matter" evidence admissible during the selection phase. Furthermore, bifurcation permits confrontation issues to be dealt with solely in the eligibility phase, when the jury is still determining whether the elements of capital murder exist. Once that determination has been made, presentation of evidence in the selection phase can then proceed without confrontation concerns. When a penalty hearing is not bifurcated, the State's eligibility-phase evidence and selection-phase evidence are mingled in a single presentation, giving rise to the risk that the jury's initial death-eligibility determination will be affected by selection-phase evidence that is irrelevant to death eligibility.

This court has recognized this risk previously but held that appropriate instructions can meet the concern that jurors might consider improper evidence in determining [**789] death eligibility. [36] This approach is no longer satisfactory, however, because the *Ring* and *Crawford* decisions present us with heightened constitutional, as well as practical, concerns. *Ring* has accentuated [***39] the gravity of the jury's task in determining the elements of capital murder. We must [*1342] not permit this task to be improperly affected either by "other matter" evidence or by testimonial hearsay evidence that has not been subjected to cross-examination. These risks cannot adequately be addressed through devising additional instructions or requiring courts to determine which evidence presented by the State is subject to an intermittently arising right of confrontation on the part of the defendant over the course of an unbifurcated penalty hearing.

Bifurcation precludes these risks and presents a workable solution that promotes the efficient administration of justice. [37] An unbifurcated hearing does not. Thus, I conclude that where a hearing is unbifurcated, the Confrontation Clause and *Crawford* must apply to evidence admitted during the entirety of the hearing--both [***40] its eligibility and selection aspects.

The majority contends that I am requiring capital penalty hearings to be bifurcated. I have made no such requirement and have merely concluded that *Crawford*'s protections should be applied differently depending on whether the proceeding is bifurcated. Accordingly, here, because Summers's capital penalty hearing was not bifurcated, his right to confrontation applied to testimonial hearsay throughout the entire hearing.

---

[36] *See Evans*, 117 Nev. at 635-37, 28 P.3d at 516-17; *see also Hollaway*, 116 Nev. at 746, 6 P.3d at 997.

[37] *See U.S. v. Mayhew*, 380 F. Supp. 2d 936, 957 (S.D. Ohio 2005) (recognizing that bifurcation of a capital penalty hearing alleviates concerns over the Confrontation Clause and *Crawford*).

Further, I disagree with the majority that limiting instructions will sufficiently protect a defendant against a constitutional violation in a death penalty proceeding. The discrete evidentiary distinctions made in the eligibility and selection phases of a capital penalty hearing are not easily compartmentalized. In addition, emotions are [***41] elevated in most death penalty cases making it much more difficult to ignore certain evidence for one purpose but then use that same evidence for another purpose.

As has often been said, death is different. With regard to jurors' ability to follow limiting instructions in this difficult and emotional area, I believe "that the practical and human limitations of the jury system cannot be ignored." [38] Eligibility determinations in death penalty cases are situations where the system's fallibility must be conceded. Accordingly, I disagree with the majority, and I conclude that limiting instructions cannot cure this potential for violation of constitutional rights in death penalty hearings.

The final question is whether Summers's confrontation rights were violated. Summers contends that the admission of documentary exhibits consisting of nearly 835 pages during his penalty hearing violated his confrontation rights. [***42] These documents included LVMPD records and arrest reports; a 1996 judgment of [*1343] conviction for robbery and possession of a stolen vehicle; juvenile and family court records; LVMPD gang unit investigation cards; and inmate disciplinary reports. [39]

However, Summers has not demonstrated any prejudice. He not only initially failed to provide this court with copies of the documents on appeal, [40] but he has failed to specify any statements within these documents that violated the Confrontation Clause or to explain how they were prejudicial. Review of the documents reveals that they do [***43] include some statements containing testimonial hearsay. Thus, these statements were likely admitted in violation of the Confrontation Clause and *Crawford*.

Nevertheless, this court may deem a constitutional error harmless where it is clear [**790] beyond a reasonable doubt that the verdict rendered was "'surely unattributable to the error.'" [41] I am confident that any Confrontation Clause errors that occurred here were harmless beyond a reasonable doubt. Even if the testimonial hearsay had been stricken, the basic information damaging to Summers's case still would have been presented to the jury, *i.e.*, the nature and number of his prior arrests, convictions, and inmate disciplinary violations. Also, it is pertinent that Summers was sentenced only to a term of life in prison without the possibility of parole, not death, even though the jury found that the aggravating circumstances outweighed the mitigating circumstances. Given Summers's extensive criminal history [***44] and the nature of the murder in this case, it is clear beyond a reasonable doubt that even if testimonial statements within the

---

[38] *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[39] In *Thomas v. State*, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998), this court held that prison inmate disciplinary reports may be admissible under the business records exception to the hearsay rule. *See* NRS 51.135. In light of *Crawford*, the continuing viability of *Thomas* for this proposition is doubtful where the disciplinary reports contain testimonial statements.

[40] *See* NRAP 10(a)(1); NRAP 11(a)(1).

[41] *Flores v. State*, 121 Nev. 706, 721, 121 Nev. 706, 120 P.3d 1170, 1180 (2005) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

documentary exhibits had been excluded from evidence, the jury still would not have imposed a sentence of life with the possibility of parole.

Therefore, I concur with the majority's conclusion that reversal of Summers's sentence is not warranted.

End of Document