No. 18-5331

IN THE SUPREME COURT OF THE UNITED STATES

September 18, 2018

RALPH JEREMIAS, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

CAPITAL CASE

1. Whether the weighing of aggravating and mitigating circumstances must be made under the beyond a reasonable doubt standard under Hurst v. Florida, 136 S.Ct. 616 (2016)?

2. Whether the confrontation clause applies to evidence offered to prove eligibility for the death penalty?

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STATEMENT OF THE CASE

In June of 2009, Ralph Jeremias, along with codefendants, Carlos Zapata and Ivan Rios conspired to rob roommates Brian Hudson and Paul Stephens. Jeremias entered Hudson and Stephens' apartment and shot each of them in the head. Jeremias, Zapata and Rios fled the scene empty-handed. Jeremias and Zapata ultimately returned to the apartment and stole property from the victims. The trials of the three co-defendants were severed. Jeremias was found guilty by a jury and sentenced to death on each of two counts of murder. Zapata entered into a plea agreement and agreed to testify against the co-defendants. Rios went to trial and was acquitted. Jeremias' conviction and death sentences were affirmed on appeal. Jeremias v. State, 412 P.3d 43 (Nev. 2018).

REASONS FOR DENYING THE PETITION

I.
HURST v. FLORIDA, 577 U.S. __, 136 S.Ct. 616 (2016), DOES NOT REQUIRE APPLICATION OF THE BEYOND A REASONABLE DOUBT STANDARD TO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

The selection phase of a capital sentencing proceeding is not an element of any offense and is not subject to the beyond a reasonable doubt standard since such a moral judgment is not a factual determination. Hurst does not hold that the weighing of aggravating against mitigating circumstances is an element subject to the beyond a reasonable doubt standard.

Nevada capital penalty proceedings comply with the requirements of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 435 (2000), Ring v. Arizona, 536 U.S. 122 S. Ct. 2428, 153 L.Ed. 2d 556 (2002) and Hurst since a jury determines death eligibility using the beyond a reasonable doubt standard:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

Once the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt, thereby

establishing death eligibility, the question becomes one of determining the appropriate punishment. However, this second step "is not part of the narrowing aspect of the capital sentencing process. Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what [the Nevada Supreme Court] has referred to as the selection phase of the capital sentencing process." Lisle v. State, 131 Nev. ___, ___, 351 P.3d 725, 732 (2015).

Nevada's weighing process cannot be an element that increases the possible punishment because mitigating circumstances operate as an affirmative defense that can preclude a death sentence once a defendant is found eligible for capital punishment. A capital defendant in Nevada can be sentenced to death if the jury finds no mitigating circumstances at all. Nunnery, 127 Nev. at 772, 263 P.3d at 251. Death is even an option in the 50/50 situation because mitigation must outweigh aggravation. Id. at 777, 263 P.3d at 254. Mitigation is irrelevant to death eligibility and only comes into play once the decision to increase a capital defendant's exposure to additional possible punishment has already been made. As such, the selection phase is not an element under Ring.

Nor is the weighing of mitigation against aggravation subject to the beyond a reasonable doubt standard. The Nevada Supreme Court concluded that the selection phase is not a factual determination and is not subject to the beyond a reasonable

doubt standard. Nunnery, 127 Nev. 749, 772-76, 263 P.3d at 251-53. The Nevada Supreme Court reached this conclusion in the context of a Ring and Apprendi challenge to the omission of the beyond a reasonable doubt standard from Nevada's weighing instruction. Id.

Nevada has long rejected any attempts to apply a reasonable doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the reasonable doubt standard does not apply to this individualized decision by the jurors: "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (*citing* Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond a reasonable doubt standard is permissible because the states enjoy a broad range of

discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S.Ct. 2516, 2525 (2006) (*citing* Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320 (1988). "Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047 (1990).

Petitioner offers several equally flawed arguments designed to wrongly expand the scope of Apprendi, Ring and Hurst. Petitioner begins by misstating the holding of Hurst. Petitioner contends that Hurst "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." (Petition, p. 13 (*citing*, Hurst, 577 U.S. at __, 136 S.Ct. at 621-22)). However, Hurst simply does not stand for that proposition. The portion of Hurst cited by Petitioner set out the statutory prerequisites for imposing a sentence

of death and noted that Florida law required that those findings be made by a judge. Hurst, 577 U.S. at __, 136 S.Ct. at 622. This Court pointed out that the role of the jury under Florida law was advisory only. Id. Indeed, this Court specifically limited the scope of Hurst to aggravating circumstances when setting out the actual holding:

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

Id. at __, 136 S.Ct. at 624 (emphasis added).

Perhaps the strongest reason to reject Petitioner's dubious construction of Hurst is how this Court dealt with its own precedent in Hurst. Hurst cited Walton without overruling it. Hurst, 577 U.S. at __, 136 S.Ct. at 622. This is interesting because Petitioner's warped interpretation of Hurst concludes that "a factual finding that mitigating circumstances do not outweigh aggravating circumstances must be proven beyond a reasonable doubt." (Petition, p. 20). This is in direct conflict with Walton:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, *a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances* sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650, 110 S.Ct. 3047, 3055 (1990) (emphasis added). If this Court intended the holding Petitioner attributes to Hurst, this Court would have

addressed this direct conflict. Indeed, where Walton conflicted with Ring this Court squarely addressed the issue and overruled Walton in part. Ring, 536 U.S. at 609, 122 S.Ct. at 2443 ("we overrule Walton to the extent that it allows a sentencing judge ... to find an aggravating circumstance necessary for imposition of the death penalty.").

Similarly, in overruling Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055 (1989), and Spanziano v. Florida, 468 U.S. 477, 104 S.Ct. 3154 (1984), Hurst stated, "[t]he decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty." Hurst, 577 U.S. at __, 136 S.Ct. at 624. If this Court intended Hurst to apply to more than aggravating circumstances it would have said so in addressing these precedents. That this Court specifically limited the invalidation of Hildwin and Spanziano to aggravating circumstances clearly brings into question the legitimacy of Petitioner's position.

Petitioner's reliance upon Raulf v. State, 145 A.3d 430 (Del. 2016), is equally problematic. Raulf is a tortured opinion that reached consensus only on conclusions. Id. at 432-34. However, when asked whether Hurst applied retroactively, the Delaware Supreme Court distinguished Raulf from Hurst. Powell v. State, 2016 Del. LEXIS 649, p. 9 (Del. 2016) ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of

proof.").[1] It is important to note that the burden of proof issue that the Delaware Supreme Court said was not at issue in Ring and Hurst but controlling in Raulf is the entire point of Petitioner's Hurst argument. (Petition, p. 20 ("a factual finding that mitigating circumstances do not outweigh aggravating circumstances must be proven beyond a reasonable doubt.")). Petitioner's citation to Raulf is highly questionable because only a few months after Raulf the Delaware Supreme Court distinguished Raulf from Hurst on the very burden of proof issue for which Petitioner relies upon Raulf as support for his Hurst argument.

While Petitioner offers pre-Hurst authority in an attempt to recycle arguments related to Ring and Apprendi his post-Hurst authority is limited to Raulf and the Florida Supreme Court's remand opinion in Hurst. Petitioner almost totally ignores the weight of appellate authority concluding that Hurst was a mere application of Ring. Davila v. Davis, 650 Fed.Appx. 860, 872-73 (5th Cir. 2016) (on appeal of district court's rejection of argument that Texas' death penalty statute was "unconstitutional ... because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt" the Court concluded that

[1] The questionable nature of the Delaware Supreme Court's Hurst jurisprudence is further demonstrated by Powell's conclusion that Delaware's precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell, 2016 Del. LEXIS 649, p. 10-11. Such overreaching is dubious because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006).

"[r]easonable jurists would not debate the district court's resolution, even after Hurst."); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive a defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of the aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance ... has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. ... Nothing in Hurst ... affects our conclusions in this regard."); Ex parte Bohannon, 2016 Ala. LEXIS 114, p. 15 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio-8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring.").

Petitioner's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. This Court allowed the rejection of Petitioner's argument by the California and Alabama Supreme Courts to stand. If this Court intended the expansionist reading of Hurst suggested by Petitioner, certiorari would have been granted in Rangel and Bohannon to give guidance to the lower courts.

Conversely, Petitioner's suggestion that remand with instruction to consider Hurst in Kirksey v. Alabama, __ U.S. __, 136 S.Ct. 2409 (2016), Wimbley v. Alabama, __ U.S. __, 136 S.Ct. 2387 (2016), and Johnson v. Alabama, __ U.S. __, 136 S.Ct. 1837 (2016), supports his interpretation of Hurst is utterly unpersuasive since the underlying decisions in those cases were reached prior to the publication of Hurst. Kirksey v. State, 191 So.3d 810 (Ala. Crim. App. 2014); Wimbley v. State, 191 So.3d 176 (Ala. Crim. App. 2014); Johnson v. State, 2015 Ala. Crim. App. LEXIS 3 (Ala. Crim. App. 2015).

Ultimately, that this Court saw Hurst as a mere application of Ring is made clear by the plain text of the opinion:

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

Hurst, 577 U.S. at __, 136 S.Ct. at 622.

Accordingly, in affirming Petitioner's sentences, the Nevada Supreme Court stated:

> 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. 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 find 'the facts...[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 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 in 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 [the Nevada Supreme 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 Ex parte Waldrop, 859 So. 2d 1181, 1189 (Ala. 2002))).

Jeremias v. State, 134 Nev. Adv. Op. 8, p. 19-20, 2018 Nev. LEXIS 10, p. 23-25 (March 1, 2018).

Therefore, Hurst imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

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II.
THE CONFRONTATION CLAUSE DOES NOT APPLY TO CAPITAL PENALTY HEARINGS

Jeremias contends the admission of Ivan Rios' recorded statement through the testimony of the interviewing detective during his penalty hearing violated Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991), and Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). Under Bruton, statements of one defendant incriminating another defendant may not be admitted in a joint trial because such would violate the Confrontation Clause. 391 U.S. at 137, 88 S. Ct. at 1628. This rule applies only in the context of a joint trial. See, e.g., Frazier v. Cupp, 394 U.S. 731, 735, 89 S. Ct. 1420, 1423 (1969) (finding Bruton applies to the unique context where a jury is "asked to perform the mental gymnastics of considering an incriminating statement against one of two defendants in a joint trial"); United States v. Mitchell, 502 F.3d 931, 965 (9th Cir. 2007) ("However, Bruton applies only where co-defendants are tried jointly, and is inapplicable when the non-testifying co-defendant is severed out[.]") (*citing* United States v. Gomez, 276 F.3d 694, 699 (5th Cir. 2002), United States v. Briscoe, 742 F.2d 842, 847 (5th Cir. 1984)); People v. Brown, 31 Cal. 4th 518, 537, 73 P.3d 1137, 1156 (2003) ("The Aranda/Bruton rule addresses the situation in which 'an out-of-court confession of one defendant . . . incriminates not only that defendant but another defendant *jointly charged*.'") (emphasis in original) (quoting People v. Fletcher, 13 Cal. 4th 451, 453, 917 P.2d 187 (1996);

Commonwealth v. McCrae, 574 Pa. 594, 614, 832 A.2d 1026, 1038 (2002). See also Dutton v. Evans, 400 U.S. 74, 85-87, 103, 91 S. Ct. 210, 218-19, 226 (1970) (plurality opinion in which eight justices agree Bruton focuses on the unique concerns of partially admissible confessions in joint trials).

As a general rule, the Confrontation Clause does not apply to capital penalty hearings. Williams v. New York, 337 U.S. 241, 242-52, 69 S. Ct. 1079 (1949); Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). Although some jurisdictions have expanded Bruton to capital penalty hearings, such expansion has generally been within the context of joint trials. See, People v. Floyd, 1 Cal. 3d 694, 719-20, 464 P.2d 64, 80 (1970); State v. Williams, 690 S.W.2d 517, 521, 530 (Tenn. 1985). When a Confrontation Clause objection is not raised at trial, the alleged violation is reviewed for plain error. Vega, 236 P.3d at 638. Such an error will be addressed "if it was plain and affected the defendant's substantial rights." Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008).

In Jeremias' penalty hearing, Detective Dan Long testified, in part, as to a recorded interview he conducted with Rios on June 24, 2009. 13 ROA 2834-2847, 25 ROA 5413-47. Specific statements by Rios as well as a transcript of the recorded interview were admitted without objection. 13 ROA 2836-47. Specifically, Rios confirmed Zapata's testimony that Jeremias entered the victims' apartment with a loaded firearm and shot both victims. 13 ROA 2841, 2843-44. Rios also told the

detectives several times that he was afraid of Jeremias and did not want to testify against him for fear Jeremias may kill him. 13 ROA 2839, 2845-47.

First, Jeremias' claim is without merit because Bruton, like all other rights arising from the Confrontation Clause, does not apply to capital penalty hearings. Jeremias relies significantly on Lord for the proposition that Bruton applies to capital penalty hearings. Jeremias further contends the Lord rule was recognized in Summers as an exception to the holding in the latter case that the Confrontation Clause does not apply to capital penalty hearings. However, the Nevada Supreme Court's jurisprudence concerning Lord has been unclear. While the Summers Court noted its opinion in Lord held the admission of "a nontestifying codefendant's confession generally violates a defendant's right to confrontation under Bruton," it also confined Lord to its facts. 122 Nev. at 1331, 148 P.3d at 782. Further, on the same day Summers was decided, the Nevada Supreme Court issued an opinion in Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006), which significantly undermined, if not implicitly overruled, Lord. In Thomas, the preliminary hearing testimony of a non-testifying co-defendant which implicated the defendant was admitted during the eligibility phase of a capital penalty hearing. 122 Nev. at 1365-66, 148 P.3d at 730-31. The defendant contended such admission violated his right to confront the witnesses against him at his capital penalty hearing. Id. at 1367, 148 P.3d at 732. However, the Nevada Supreme Court rejected that argument, and held

that "Crawford and the Confrontation Clause do not apply during a capital penalty hearing." Id. (*citing* Summers, 122 Nev. 1333, 148 P.3d 783). Thomas is indistinguishable from Lord. In both cases, the prior statement of a non-testifying co-defendant was admitted at a severed capital penalty hearing.[2] Compare Thomas, 122 Nev. at 1365-66, 148 P.3d at 732, with Lord, 107 Nev. at 43-44, 806 P.2d at 558.

Lord is inconsistent with the general Confrontation Clause holdings of the Nevada Supreme Court and the United States Supreme Court. The Nevada Supreme Court has repeatedly and unequivocally held that the Confrontation Clause does not apply to capital penalty hearings. See, e.g., Burnside v. State, 131 Nev. Adv. Rep. 40, 352 P.3d 627, 650 n.9; Johnson, 122 Nev. at 1353, 148 P.3d at 773; Summers, 122 Nev. at 1333, 148 P.3d at 783 ("We therefore conclude that neither the Confrontation Clause nor Crawford apply to evidence admitted at a capital penalty

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[2] Although Jeremias may argue that Thomas is distinguishable in that the defendant had a prior opportunity to cross-examine the non-testifying co-defendant at a preliminary hearing, this argument is unpersuasive. In order to engage in any analysis as to whether there was a sufficient prior opportunity to cross-examine a non-testifying witness, it must first be determined that the Confrontation Clause ***applies***. If it does not, prior opportunities to cross-examine are rendered moot along with any analysis as to whether the non-testifying witness was truly unavailable or the statement was "testimonial." See Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006) (finding determination of testimonial nature of statements irrelevant because the defendant did not enjoy a Sixth Amendment right to confront the witnesses against him at his capital penalty hearing). Therefore, the Thomas Court could not have reached the issue of prior cross-examination because it explicitly found that the Confrontation Clause does not apply and any argument based on that procedural distinction is irrelevant to harmonizing Thomas with Lord.

hearing and the decision in Crawford does not alter Nevada's death penalty jurisprudence."); Thomas, 122 Nev. at 1367, 148 P.3d at 732. These holdings have been based on United States Supreme Court jurisprudence. See Williams, 337 U.S. at 242-52, 69 S. Ct. 1079; United States v. Umana, 750 F.3d 320, 346 (4th Cir. 2014) ("Courts have long held that the right to confrontation does not apply at sentencing, even in capital cases.") (*citing* Williams, 337 U.S. 241, 69 S. Ct. 1079). Bruton, as an application of the Confrontation Clause, should be equally absent from capital penalty hearings.

Nevada statutory authority likewise supports the proposition that the Confrontation Clause, in all of its manifestations, does not apply to penalty hearings. NRS 175.552(3) provides:

During the 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 the sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

Here, Jeremias does not allege any constitutional violation, either State or Federal, with the "securing" of Rios' statement (i.e. that Rios' statement was involuntary or taken in violation of Miranda). Thus, NRS 175.552(3) allows for the admission of Rios' statement as well as any evidence Jeremias would seek to introduce to impeach the same.

The widely known and accepted proposition that the Confrontation Clause does not apply to capital penalty hearings is premised on the policy that factfinders determining a sentence should have before them as much information as possible related to the offense as well as the offender. See, e.g., Williams, 337 U.S. at 247, 69 S. Ct. at 1083 ("A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."); Umana, 750 F.3d at 347 ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.") (quoting Gregg v. Georgia, 428 U.S. 153, 204, 96 S. Ct. 2909 (1976). This indisputably important policy interest applies equally to hearsay evidence, whether from a non-testifying co-defendant or from some other source.

Although Jeremias may contend the incriminating statements of a non-testifying co-defendant are inherently more unreliable than hearsay from other sources and, therefore, Bruton's application to capital penalty hearings is appropriate despite the exclusion of the Confrontation Clause in all other respects, this claim is without merit. First, as provided under NRS 175.552(3), Jeremias is statutorily permitted to admit evidence to refute any hearsay evidence presented at his penalty hearing. Further, defendants in Jeremias' position would likewise be free to argue, and the jury would be well aware, that the statements made by a non-testifying co-defendant were made within the context of a pending criminal investigation. The jury would then be free to give whatever weight they wished to the statements, fully aware of the potential that the non-testifying co-defendant was attempting to reduce their own culpability by making incriminating statements against the defendant. Most importantly, the jury would have more evidence, not less, on which to base their sentencing decision, which is the goal of any sentencing proceeding.

The majority of Federal and State courts are in agreement that Bruton applies exclusively to the unique prospect of joint trials. Mitchell, 502 F.3d at 965; Gomez, 276 F.3d at 699, Briscoe, 742 F.2d at 847; Brown, 31 Cal. 4th at 537, 73 P.3d at 1156; McCrae, 574 Pa. at 614, 832 A.2d at 1038; Williams, 690 S.W.2d at 521, 530. The Nevada Supreme Court has repeatedly and consistently stated the Bruton rule as prohibiting the admission of a non-testifying co-defendant's statement which

incriminates the defendant at a joint trial. See, e.g., Rimer v. State, 131 Nev. Adv. Rep. 36, 351 P.3d 697, 711 (2015); Byford v. State, 116 Nev. 215, 229, 994 P.2d 700, 710 (2000); Ewish v. State, 110 Nev. 221, 871 P.2d 306 (1994) (noting the procedure of separate jury panels arose out of an effort to avoid Bruton issues at joint trials).

Here, Jeremias was not tried jointly with Rios. In fact, at the time Rios' statement was admitted in Jeremias' penalty hearing, Rios was not even a defendant, let alone co-defendant in the case, as he had been previously acquitted. Rios' complete removal from the criminal prosecution at the time his statements were admitted against Jeremias eliminates the principal concern at the heart of Bruton. The jury was not required to perform any "mental gymnastics" by considering Rios' statement as to the guilt or appropriate penalty of one defendant while simultaneously excluding the same evidence as it related to another defendant. Jeremias was the only defendant for which the jury was considering a penalty and the evidence was admitted solely against him, not any other codefendants. Because the admission of Rios' statement was ***not*** the admission of a co-defendant's statement at a joint trial, Bruton was not violated.[3]

[3] To the extent Lord can be read to implicitly stand for the proposition that Bruton applies to penalty hearings even when the co-defendant has been severed, such an interpretation is without merit. Bruton, both by its terms and by subsequent United States Supreme Court case law, only applies to joint trials based on the unique concerns as expressed in that case.

Finally, this case is distinguishable from Lord such that admission of Rios' statement did not constitute plain error. In Lord, the Court noted that the non-testifying co-defendant's statement was admitted "to alleviate any lingering doubt the jury may have had concerning their verdict of guilt." 107 Nev. at 31, 806 P.2d at 558. Here, however, Rios' statement was not admitted to remove any lingering doubt of Jeremias' guilt but instead was offered as relevant character evidence of Jeremias as well as to impeach certain mitigating evidence offered. See 15 ROA 3191-92 (arguing Rios' statement includes no mention of drug use by Jeremias prior to the murders); 15 ROA 3203-05 (noting Rios' statements he was afraid of Jeremias and did not want to testify against him for fear Jeremias would kill him). Further, Jeremias admitted evidence that Rios had been tried and acquitted for the same offenses he was convicted of and relied on that fact in closing argument to ask for a merciful sentence. See 13 ROA 2850; 15 ROA 3217-18. Given that Rios' acquittal was admitted during Jeremias' penalty phase, the context of that acquittal, including Rios' voluntary statement, was relevant. More importantly, such motives for admitting Rios' statement are distinct from those present in Lord.

Additionally, any error did not affect Jeremias' substantial rights. In finding the Bruton violation prejudicial in Lord, the Court noted the non-testifying co-defendant's confession "was central in cementing the State's circumstantial case in the minds of the jurors." 107 Nev. at 44, 806 P.2d at 558. Here, in contrast, Rios'

statement largely mirrored Zapata's in-court testimony. This is especially true regarding those parts of Rios' statements that incriminated Jeremias and form the entirety of Jeremias' Bruton claim. The parts of Rios's statement in which he describes his fear of Jeremias due to Jeremias' violent character did not violate Bruton, even under the most expansive reading of that case. Because the parts of Rios' statement that incriminated Jeremias were repeated by Zapata's live testimony and because other parts of Rios' statement of which Jeremias complains would have been admissible under Bruton and Lord, any prejudice to Jeremias as a result of alleged Bruton error was *de minimis*.

Further, information regarding Jeremias' criminal history was properly admitted during the penalty hearing through exhibits and the testimony of Detective Long. The Sixth Amendment right of confrontation is a trial right and has no application to a penalty hearing or sentencing. Summers, 122 Nev. at 1333, 148 P.2d at 783; see also, Sheriff v. Witzenburg, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004-05 (2006) (noting the Sixth Amendment is a "trial right"). In Summers, the Nevada Supreme Court undertook significant analysis as to whether the Confrontation Clause applied to a capital penalty hearing. 122 Nev. at 1331-34, 148 P.3d at 782-84. The Nevada Supreme Court relied on Williams for the proposition that admission of hearsay in a capital penalty hearing did not violate the Due Process clause of the Fourteenth Amendment and found the United States Supreme Court's decision in

Crawford did not overrule Williams. Id. The Summers Court also noted that "[n]o 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." Id. at 1332, 148 P.3d at 782. The Nevada Supreme Court also found that NRS 175.552(3) allows for the admission of hearsay in capital penalty hearings and concluded: "[a]bsent controlling 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." Id. at 1333, 148 P.3d at 783. The decision in Summers has remained good law for the last near decade. See, e.g., Burnside, 352 P.3d at 627 n.9.

The admission of Jeremias' criminal history did not violate the Confrontation Clause. As the Nevada Supreme Court held in Summers, the Confrontation Clause has no application at capital penalty hearings. 122 Nev. at 1333, 148 P.3d at 782-83. Although Jeremias provides a few non-binding cases that, at best, marginally support his proposition, the basis of the Nevada Supreme Court's decision in Summers has remained unchanged. Specifically, there has been no controlling authority in the intervening ten years since Summers that has overruled Williams. Additionally, Jeremias points to no Federal circuit courts of appeal that have adopted his argument and applied confrontation rights to capital penalty hearings. Finally, the weight of

authority still remains that hearsay is admissible at penalty hearings, capital and noncapital alike. See, e.g., Muhammad v. Secretary, Florida Dept. of Corrections, 733 F.3d 1065, 1077 (11th Cir. 2013); United States v. Yeung, 672 F.3d 594, 606 (9th Cir. 2012) (affirming United States v. Littlesun, 444 F.3d 1196, 1199 (9th Cir. 2006) abrogated, in part, on other grounds, by Robers v. United States, 134 S. Ct. 1854 (2014); Szabo v. Walls, 313 F.3d 392 (7th Cir. 2002); United States v. Fields, 483 F.3d 313 (5th Cir. 2007); Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013); State v. McGill, 213 Ariz. 147, 140 P.3d 930 (2006); State v. Shackleford, 155 Idaho 454, 314 P.3d 136, 142-44 (2013); People v. Banks, 237 Ill. 2d 154, 203, 934 N.E.2d 435 (2010); State v. Berget, 826 N.W.2d 1, 21 (S.D. 2013); State v. Stephenson, 195 S.W.3d 574 (Tenn. 2006).

Further, it is worth noting that the vast majority of the cases on which Jeremias relies for support hold only that the Confrontation Clause applies to the "eligibility phase" of capital penalty hearings. See United States v. Jordan, 357 F. Supp. 2d 889, 902-05 (E.D. Va. 2005) (finding the Confrontation Clause applies to the eligibility phase but not to the "selection phase"); United States v. Johnson, 378 F. Supp. 2d 1051, 1061-62 (N.D. Iowa 2003) (same); State v. McGill, 213 Ariz. 147, 158-59, 140 P.3d 930, 942 (2006) (same); State v. Bell, 359 N.C. 1, 34-37, 603 S.E.2d 93, 115-16 (2004) (finding admission of out-of-court statement to establish a statutory aggravator violated the Confrontation Clause). Although Summers was not a

unanimous decision, one thing all members of that Court agreed on was that the Confrontation Clause does not apply to the "selection phase" of a capital penalty hearing. 122 Nev. at 1333, 148 P.3d at 783 (noting uniform agreement among the majority and dissenting opinions that the Confrontation Clause does not apply to the "selection phase"); see also 122 Nev. at 1340, 148 P.3d at 787-88 ("I see no basis in either Ring or Crawford to extend the Sixth Amendment confrontation right to the selection phase of a capital penalty hearing.") (J. Douglas, dissenting). Further, Summers noted that, if the Confrontation Clause applied to the "eligibility phase" but not the "selection phase" of a capital penalty hearing, unbifurcated penalty hearings, such as the one conducted in this case, would "remain constitutionally viable." Thus, to the extent the vast bulk of Jeremias' non-binding authority stands for the proposition that the Confrontation Clause applies to the "eligibility phase" of capital penalty hearings, adopting such a rule would not condemn the result or the procedure in this case one iota.[4]

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[4] The State also notes that Jeremias likewise relied significantly on hearsay evidence to present alleged mitigating circumstances. See 14 ROA 2863, 2868, 2910-35, 3112-13. This hearsay evidence was admitted without objection. In light of the fact that both parties relied extensively on out-of-court statements, it cannot be suggested that the rule announced in Summers exclusively benefits either party in a criminal proceeding to the detriment of the opposing party. Instead, the policy behind Summers is the same articulated in Williams: to provide the relevant factfinder with as much information as possible to inform their decision regarding the penalty to be imposed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State respectfully requests that certiorari be denied.

Respectfully submitted.

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