No. 19-7647

IN THE SUPREME COURT OF THE UNITED STATES

March 12, 2020

WILLIAM PATRICK CASTILLO, *Petitioner,*

ANTONIO LAVON DOYLE, *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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QUESTION PRESENTED

CAPITAL CASES

1. Whether this Court should not overrule Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990) because it is not inconsistent with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

2. Whether the Nevada Supreme Court did not violate Petitioners' rights by requiring the jury to determine whether the mitigating circumstances did not outweigh the aggravating circumstances in imposing the death penalty.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. WILLIAM CASTILLO

On January 19, 1996, William Castillo (hereinafter "Castillo" or collectively with Doyle "Petitioners"), along with his co-defendant, was charged by Indictment with: Count 1 – Conspiracy to Commit Burglary and/or Robbery; Count 2 – Burglary; Count 3 – Robbery, Victim 65 Years or Older; Count 4 – Murder with a Deadly Weapon; Count 5 – Conspiracy to Commit Burglary and Arson; Count 6 – Burglary; and Count 7 – First Degree Arson. On January 23, 1996, the State filed a Notice of Intent to Seek Death Penalty.

Jury trial commenced on August 26, 1996. On September 4, 1996, the jury returned a verdict of guilty on all counts. On September 19, 1996, the penalty phase commenced. On September 25, 1996, the jury imposed a sentence of Death as to Count 4. The jury found 4 aggravating circumstances: the murder was committed by a person previously convicted of a felony involving the use or threat of violence, the murder was committed while Castillo was committing a burglary, the murder was committed while Castillo was committing a robbery, and the murder was committed to avoid or prevent lawful arrest. The jury also found 3 mitigating circumstances: the youth of Castillo at the time of the crime, the murder was committed while he was under the influence of extreme emotional distress, and any other mitigating circumstances. The Judgment of Conviction was filed on November 12, 1996.

On November 4, 1996, Castillo filed a Notice of Appeal. On April 2, 1998, the Nevada Supreme Court affirmed Castillo's conviction and death sentence. The Nevada Supreme Court stayed issuance of remittitur pending Castillo's Petition for Writ of Certiorari, which was filed on January 22, 1999. On March 22, 1999, this Court denied Castillo's Petition for Writ of Certiorari. Remittitur for Castillo's direct appeal issued on April 28, 1999.

On April 2, 1999, Castillo filed a pro per Petition for Writ of Habeas Corpus. On October 12, 2011, appointed counsel filed a Supplement in support of the

Petition. On August 2, 2002, the district court held an evidentiary hearing. On January 22, 2003, after additional briefing, the district court denied the Petition.

On February 19, 2003, Castillo filed a Notice of Appeal. On February 5, 2004, the Nevada Supreme Court issued an Order affirming the district court's ruling and issuance of remittitur was stayed to allow Castillo to file a Petition for Writ of Certiorari, which was filed on May 5, 2004. This Court denied Castillo's Petition for Writ of Certiorari on October 4, 2004. The Nevada Supreme Court issued remittitur on October 27, 2004.

On June 22, 2004, Castillo filed a Petition for Writ of Habeas Corpus in Federal Court. On July 7, 2004, counsel was appointed to represent Castillo. On July 31, 2007, Castillo filed a pro per motion to waive his federal habeas and requested execution of the State death penalty judgment. On August 13, 2007, the United States District Court thoroughly canvassed Castillo and ruled Castillo was competent. On September 4, 2007, the Federal District Court dismissed Castillo's federal habeas action.

On May 7, 2008, Castillo filed a motion to vacate the previous judgment and reopen his federal habeas action, which was granted on May 15, 2008. On December 15, 2008, Castillo filed an Amended Petition for Writ of Habeas Corpus. On September 18, 2009, Castillo filed a Second Petition for Writ of Habeas Corpus. On April 9, 2010, the district court denied Castillo's Second Petition. The court entered

its Findings of Fact, Conclusions of Law and Order on May 21, 2010. On June 4, 2010, Castillo filed a Notice of Appeal. On July 18, 2013, the Nevada Supreme Court affirmed the district court's decision and remittitur issued on December 17, 2013.

On January 6, 2017, Castillo filed a Third Petition for Writ of Habeas Corpus. On May 3, 2017, the district court denied Castillo's Third Petition. The court issued its Findings of Fact, Conclusions of Law and Order on May 31, 2017. On July 5, 2017, Castillo filed a Notice of Appeal. On May 30, 2019, the Nevada Supreme Court issued an Order affirming the district court's decision. On September 9, 2019, Castillo filed a Motion to Stay Remittitur Pending Petition for Writ of Certiorari. On September 19, 2019, the Nevada Supreme Court issued an Order granting Castillo's motion. On February 3, 2020, Petitioners filed a Petition for Writ of Certiorari.

II. ANTONIO DOYLE

On June 1, 1994, Antonio Lavon Doyle (hereinafter "Doyle" or collectively with Castillo "Petitioners"), along with his co-defendants, was charged by Information with: Count 1 – Murder; Count 2 – Conspiracy to Commit Murder; Count 3 – Robbery; Count 4 – First Degree Kidnapping; and Count 5 – Sexual Assault. On June 2, 1994, the State filed a Notice of Intent to Seek Death Penalty.

Jury trial commenced on January 3, 1995. On January 12, 1995, the jury returned a verdict of guilty on all counts. On February 6, 1995, the penalty phase commenced. On February 9, 1995, the jury returned a special verdict finding that

Doyle had no significant history of prior criminal activity and other mitigating circumstances and weighed that against the finding that the murder was committed by someone under a sentence of imprisonment, the murder was committed while the person was engaged in the commission of or an attempt to commit any First Degree Kidnapping, and the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. The jury imposed a sentence of Death as to Count 1. The Judgment of Conviction was filed on May 24, 1995.

On May 1, 1995, Doyle filed a Notice of Appeal. On July 22, 1996, the Nevada Supreme Court reversed Doyle's conviction for the sexual assault, citing insufficient evidence. However, the Nevada Supreme Court affirmed Doyle's conviction on all other counts and affirmed Doyle's death sentence. Remittitur issued on July 1, 1997.

On June 26, 1997, Doyle filed a Petition for Writ of Habeas Corpus. On September 22, 1997, Doyle filed a memorandum of points and authorities in support of his petition. The district court held an evidentiary hearing on January 26, 1998. On May 20, 1998, Doyle filed a supplemental brief. On July 8, 1998, the district court heard oral argument and denied Doyle's petition. The district court filed a Findings of Fact, Conclusions of Law and Order on October 1, 1998. On October 16, 1998, Doyle filed a Notice of Appeal. On February 3, 2000, the Nevada Supreme

Court affirmed the district court's denial of Doyle's petition. Remittitur issued on April 13, 2000.

Doyle filed a Petition for Writ of Habeas Corpus in Federal Court on May 2, 2000. On May 31, 2000, Doyle was appointed counsel. On May 14, 2008, Doyle filed a First Amended Petition of Writ of Habeas Corpus in Federal Court. On March 19, 2009, the State filed a Motion to Dismiss the First Amended Federal Petition. On July 29, 2009, Doyle filed a Motion for Stay in Federal Court.

On July 24, 2009, Doyle filed a Second Petition for Writ of Habeas Corpus. On December 18, 2009, the State filed its Response and Motion to Dismiss. On February 8, 2013, the district court denied Doyle's Second Petition and granted the State's Motion to Dismiss. The district court entered its Findings of Fact, Conclusions of Law and Order on February 14, 2013. On March 12, 2013, Doyle filed a Notice of Appeal. On September 22, 2015, the Nevada Supreme Court affirmed the district court's ruling and remittitur issued on May 6, 2016.

On January 11, 2017, Doyle filed a Third Petition for Writ of Habeas Corpus. On May 23, 2017, the district court denied Doyle's Petition. The district court entered its Findings of Fact, Conclusions of Law and Order on October 25, 2017. On November 29, 2017, Doyle filed a Notice of Appeal. On September 13, 2019, the Nevada Supreme Court affirmed the district court's decision. On November 8, 2019, Doyle filed a Motion to Stay the Issuance of Remittitur. On November 21,

2019, the Nevada Supreme Court granted Doyle's Motion. On February 3, 2020, Petitioners filed a Petition for Writ of Certiorari.

STATEMENT OF FACTS

The following factual summaries were presented by the Nevada Supreme Court on affirmance of Petitioners' direct appeals:

I. WILLIAM CASTILLO

In late November 1995, appellant William Patrick Castillo held a job as a roofer in Las Vegas. Harry Kumma, a former co-worker, contacted Castillo and two other roofing employees, Kirk Rasmussen and Jeff Donovan, about completing a side job. The side job involved re-roofing the residence of the victim, Isabelle Berndt.

Kumma, Rasmussen, Donovan, and Castillo worked on Berndt's roof on November 25, 1995. While performing ground cleanup at Berndt's residence, Castillo indicated to Donovan that he found a key to Berndt's home and wanted to enter. Donovan told Castillo that he should not and directed Castillo to return the key to the place where he found it. In response, Castillo stated "I'll just come back later at nighttime."

Prior to these events, Castillo began residing with his girlfriend, Tammy Jo Bryant, and a friend, Michelle Platou. At about 6:00 p.m. on December 16, 1995, Castillo left the apartment with Platou in Platou's car. The two returned to the apartment at approximately 3:00 a.m. on the morning of December 17, 1995, with a VCR, a box containing silverware, and a bag containing knit booties. A few minutes later, Castillo and Platou again departed. They returned about twenty minutes later.

At about 9:00 or 10:00 a.m. on December 17, 1995, Castillo and Platou allegedly informed Bryant that they had committed a robbery and stolen several items. According to Bryant, Castillo and Platou further informed her that while in the house, Platou inadvertently bumped into a wall and made some noise. Castillo and Platou allegedly told Bryant that Castillo then hit a sleeping person with a tire iron Castillo brought into the house. The two then departed the scene. According to Bryant, they further stated that, out of fear that they left incriminating fingerprints on the wall of the house, they returned to the residence at 3:00 a.m. to burn down the house.

In the early morning hours of December 17, 1995, neighbors notified the police that Berndt's residence was ablaze. Firefighters found Berndt's body inside

the house. An arson investigator determined that two independent fires, set by "human hands," using some type of accelerant, caused the blaze. Investigators found a charred bottle of lighter fluid at the scene and several spots in the living room where an accelerant was present. Laboratory tests confirmed these findings.

According to the coroner's autopsy report, Berndt suffered "multiple crushing-type injuries with lacerations of the head, crushing injuries of the jaws," and several broken teeth. Berndt also had deep lacerations on the back of the head and injuries to the face and ears. According to the coroner, all injuries were contemporaneous. The coroner testified that Berndt died as a result of an intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crowbar or tire iron.

A Las Vegas Metropolitan Police Department crime analyst investigated Berndt's residence and observed fire, smoke and water damage in the living room, kitchen and master bedroom. He noted that dresser drawers had been opened, two jewelry boxes had been opened, and the house had been "ransacked." The crime analyst also observed blood marks on the wall next to Berndt's body, which was found lying on a bed.

On December 17, 1995, Berndt's only child, Jean Marie Hosking, arrived at Berndt's residence. She searched the house and determined that her mother's silverware was missing. This silverware featured a distinctive floral pattern, had an engraved "B" on each piece, and was stored in a wooden box on the shelf in Berndt's bedroom. Also missing were a VCR, Christmas booties Berndt was knitting for her grandchildren, and eight $50 U.S. savings bonds.

On December 19, 1995, Rasmussen, one of Castillo's coworkers, contacted the police. According to Rasmussen, during the carpool to work on December 18, 1995, Castillo said, "This weekend I murdered an 86–year–old lady in her sleep." Castillo also allegedly stated that he entered Berndt's house with the intent to steal Berndt's valuables, hit Berndt numerous times with a tire iron, and heard her "gurgling" in her own blood, before he put a pillow over her head to smother her. Castillo also allegedly told Rasmussen that he had stolen a VCR, money, and silverware and that he intended to sell these items to raise money to pay his attorney.

The following morning, Castillo allegedly told Rasmussen that the crime had been reported on the news. On December 19, Rasmussen drove by Berndt's residence, saw that it had been burned, and contacted the police to report what he had learned.

On the evening of December 19, 1995, Charles McDonald, another roofer, visited Castillo's apartment. Castillo offered to sell a set of silverware to McDonald for $500. McDonald testified that the silverware was in a wooden box. When McDonald later viewed Berndt's silverware, he noted that it appeared to be the same silverware that Castillo tried to sell to him.

Based upon the information provided by Rasmussen, police obtained and executed a search warrant on the apartment shared by Castillo, Bryant, and Platou at 10:00 p.m. on December 19, 1995. Castillo and Bryant were present when the police arrived and permitted them to enter; both Castillo and Bryant gave their consent to a search of their apartment. Police recovered the silverware, the VCR, the booties, and a bottle of lighter fluid from the apartment. The officers also located a notebook with the notation "$50, VCR, $75, camera, silverware."

After execution of the search warrant, the officers arrested Castillo. At the detective bureau, Castillo waived his *Miranda* rights and made statements during two separate, consecutive interviews. During the first interview, Castillo indicated that he had received the VCR and other property from a friend. Shortly after the first interview ended, the detectives returned and informed Castillo of the evidence that had been obtained against him from Bryant and Rasmussen. Castillo then confessed to the killing, robbery, and arson.

Castillo v. State, 114 Nev. 271, 273-75, 956 P.2d 103, 105-06 (1998).

II. ANTONIO DOYLE

On January 16, 1994, the nude body of twenty-year-old [E.M.] was discovered some twenty-five feet off the roadway in an unimproved desert area of Clark County, Nevada. The woman's body was found lying face down with hands extended overhead to a point on the ground where it appeared some digging had occurred. A four-inch twig protruded from the victim's rectum. Three distinct types of footwear impressions were observed in the area, none of which matched the tread design of a pair of women's athletic shoes located on the nearby dirt road. Also observed in the area was a hole containing a broken condom, a condom tip, an open but empty condom package, and two small packages of taco sauce.

In the opinion of the medical examiner, [E.M.] died from asphyxia due to strangulation or blunt trauma to the head. The autopsy revealed nine broken ribs, multiple areas of external bruising, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. Approximately 200 milliliters of fluid blood was found in [E.M.]'s chest cavity. [E.M.]'s back and chest bore a number of patterned contusions consistent with footwear impressions found at the crime scene. Finally, the autopsy revealed severe laceration of the head and subarachnoid hemorrhage (a thin layer of blood surrounding the brain) indicating blunt force trauma to the skull. Laboratory analysis revealed traces of the drug PCP in [E.M.]'s system.

Michael Smith, who had been arrested in an unrelated matter, provided the police with the names of those he believed were responsible for the murder. Smith recounted statements made by Doyle regarding a killing to which Doyle claimed to

have been a party. According to Smith, he and Doyle had overheard a girl tell some other people about her friend having been killed. At that time, Doyle commented to Smith that "we had to take someone out." Doyle further stated that he, Darrin Anderson, Shawn Atkins, and "Bubba" Atkins were at Anderson's house with a girl and that each had sex with the girl. While they were taking the girl home, she told the men that she was going to report them for rape and jumped from the truck in which they were riding. They were eventually able to coax the girl back into the truck and decided to kill her rather than face possible rape charges. The girl was apparently so inebriated or under the influence of drugs that she was oblivious to the direction the men were travelling. When they arrived at a remote area, the girl was pulled from the truck and choked. Unsuccessful in their attempt to choke her to death, the men then beat the girl. Finally, Doyle told Smith, two of the men held the girl down while the other repeatedly dropped a brick on her face until she died.

With information obtained from Smith, the police contacted Darrin Anderson, the owner of a small, yellow pickup truck. According to Anderson, on the night of January 15, 1994, he was present with Doyle at the home of Shawn and "Bubba" Atkins. After arriving, the four left the Atkins residence to attend a nearby party. Anderson returned alone to the Atkins residence a short time later, and the other three returned thereafter in the company of [E.M.], who appeared inebriated or under the influence of drugs. Later, [E.M.] asked for a ride home, and Anderson suggested that Doyle use Anderson's truck. At approximately 10:30 p.m., Doyle left with [E.M.] and the Atkins brothers in Anderson's truck. Anderson awoke the next morning to find Doyle and the Atkins brothers asleep at the Atkins residence. When police later searched Anderson's truck, they found a pair of blood-stained white socks between the seats.

Further information led investigators to contact Mark Wattley, another of Doyle's friends. Wattley was present during a conversation where Doyle made statements describing how Shawn Atkins was unable to subdue [E.M.] and how "Bubba" Atkins intervened "and hit her with a head punch and dropped her." Thereafter, Doyle told Wattley that he (Doyle) began kicking [E.M.] in the head. Eventually, one of the men grabbed a brick or rock and hit the girl in the head. At one point in the conversation, Doyle demonstrated how he (Doyle) jumped in the air and caused both of his feet to come down on Mason during the beating.

The police investigation eventually led to the execution of a search warrant at Doyle's residence. During the search, the police impounded a pair of Adidas athletic shoes with soles that apparently matched treadwear impressions found at the crime scene and on [E.M.]'s body. Doyle was then placed under arrest. Later analysis of the impounded shoes confirmed that the treadwear impressions were consistent with the footwear impressions retrieved from the scene of the crime and observed upon [E.M.]'s body.

Doyle v. State, 112 Nev. 879, 884-86, 921 P.2d 901, 905-06 (1996).

ARGUMENT

I. PETITIONERS' PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.

Petitioners' request for extraordinary relief does not present a conflict between inferior courts or an important federal question. This Court should reject Petitioners' attempt to entice it into reviewing the Nevada Supreme Court's denial of Petitioners' unsupported claim that the Nevada Supreme Court should not be permitted to reweigh the aggravating and mitigating circumstances in death penalty cases on appeal.

Rule 10 of the Rules of the Supreme Court of the United States (RSCUS) precludes discretionary intervention in this matter. Certiorari is only warranted where there is a substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled. It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts §295 (2012). As explained in Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974), "[t]his Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, "[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

An important question of federal law is one that goes beyond whether the alleged error complained of "is undesirable, erroneous or even 'universally condemned.'" Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

Petitioners do not allege a substantial conflict or an important federal question. Instead, Petitioner complains that this Court should overrule its decision in Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), to the extent that

it allows an appellate court to independently reweigh aggravating circumstances against mitigating circumstances to uphold a death sentence.

a. The State procedural bars constitute an adequate and independent state law ground precluding relief.

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a duty to consider whether postconviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to postconviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system

> dictates that there must exist a time when a criminal conviction is final.

Id. at 231, 112 P.3d at 1074. Additionally, the Nevada Supreme Court has held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

Here, remittitur issued from Castillo's direct appeal on April 28, 1999, and from Doyle's direct appeal on July 1, 1997. This means that Petitioners had one year from each of their respective remittitur dates to file a post-conviction Petition. Castillo's underlying Petition was filed on January 6, 2017, nearly 18 years after remittitur issued and in excess of the one-year time frame. Doyle's underlying Petition was filed on January 11, 2017, nearly 20 years after remittitur issued and in excess of the one-year time frame. Therefore, Petitioners' claims are time barred and review by this Court should be precluded.

Even if the one-year rule did not begin to run until Petitioners' new issue was available, their claims are still time barred. Petitioners' contention is that appellate courts should be precluded from reweighing aggravating circumstances against

mitigating circumstances to uphold a death sentence on appeal. Petitioners premise this contention upon Hurst v. Florida, 136 S. Ct. 616 (2016). Petition 1-3. It is indisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, this claim is time barred because Petitioners failed to raise it within one year of Ring's publication. The district court judge correctly applied the one-year time bars in denying the petitions below.

Further, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice

system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). The State raised this bar in its Response and Motion to Dismiss. More than 5 years has passed since remittitur issued from Petitioners' direct appeals on July 1, 1997, and January 28, 1999. Indeed, over 18 years have passed since Castillo's direct appeal was final and over 20 years have passed since Doyle's direct appeal was final. As such, the State pled statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against their Third Petitions. After such a passage of time, the State is prejudiced in its ability to answer these Petitions and retry the penalty-phase. If Petitioners' third go around on state post-conviction review was not dismissed or denied on the procedural bars, the State would have been forced to track down witnesses who may have died or retired in order to prove a case that is more than two decades old. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in the 1990s. The district court was correct in basing dismissal of the petition in part on NRS 34.800.

Moreover, claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b). The failure to raise grounds for relief at the first opportunity is an abuse of the writ. NRS 34.810(2). Additionally, petitions

that re-raise previously rejected complaints must be dismissed. Id. Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has emphasized that: "[a] court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 733 (2016) ("[A] petition ... has been filed within a reasonable time after the ... claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

Petitioners' Hurst claims are barred by NRS 34.810(1)(b(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became available to him. Petitioners' contention is that a new penalty hearing is required because of Hurst. Petition 23-24. It is indisputable that Hurst was published

in 2016; however, Hurst was merely an application of Ring. Hurst, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Petitioners' failure to raise this claim by June 24, 2003, amounts to a waiver. Petitioners could have raised their Ring complaint during the litigation of his prior petitions or could have filed an additional petition raising this contention. This claim could have been presented to the Nevada Supreme Court at any point after June 24, 2002. Petitioners' failure to do so renders his claim procedurally barred under NRS 34.810.

Certiorari should be denied because Petitioners' delay in raising these arguments amounts to an adequate and independent state law ground precluding relief. "This Court will not review a question of federal law decided by a state court if the decision is sustainable on a state law ground that is independent of the federal question and adequate to support the judgment." Lee v. Kemna, 534 U.S. 362, 375, 122 S. Ct. 877, 885 (2002); Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). This rule applies whether the state law ground is substantive or procedural. Id. The adequate state ground doctrine applies to bar federal review when the state court declines to address an inmate's federal claims because the inmate had failed to meet state procedural requirements.

b. Petitioners have failed to present an important federal question.

Petitioners argue that Hurst held the weighing determination, like the finding of an aggravating circumstance, constitutes an "element" of the offense that must be

proven by the State beyond a reasonable doubt. This interpretation of Hurst is farfetched and disingenuous. It is one thing to argue for an extension of law based on existing precedent, but quite another to misrepresent the holding of a case. Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

This Court summarized its holding in Hurst in the first two paragraphs of the opinion thusly:

> A Florida jury convicted Timothy Lee Hurst of murdering his coworker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst, 136 S. Ct. at 619. Hurst does not cite to Winship or the reasonable doubt standard because its holding only concerns the identity of the fact finder, not the standard of proof. The holding of Hurst is founded upon the Sixth Amendment right to a jury, not the Fourteenth Amendment Due Process requirement for proof beyond a reasonable doubt. Hurst is silent on that issue. On remand, the Florida Supreme Court interpreted Hurst as simply requiring that all critical findings necessary to imposition of the death penalty must be found by the jury, not the judge. Hurst v.

State, 202 So. 3d 40, 44 (Fla. 2016) ("In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances"). After Hurst, Florida now requires all necessary findings to be made by a jury rather than a judge, but still only applies the reasonable doubt standard to the existence of the aggravating factors, not the weighing. Id.

In Petitioners' cases, a jury made all necessary findings for the death penalty, including weighing, in full compliance with Hurst, which is nothing more than an application of Ring. Accordingly, Hurst does not represent an intervening change in law which requires discretionary intervention by this Court.

Many other state courts have rejected an interpretation of Hurst that would extend the beyond-a-reasonable-doubt standard to the weighing determination:

> Importantly, the [Hurst] opinion did not hold that weighing must be done beyond a reasonable doubt. Indeed Hurst says nothing at all about whether the weighing of aggravating and mitigating circumstances must be determined beyond a reasonable doubt. And Leonard points to no such discussion. Instead he parses the language of Hurst to infer the Court's meaning.

Leonard v. State, 73 N.E.3d 155, 169 (Ind. 2017). Evans v. State, No. 2013-DP-01877-SCT, 2017 Miss. LEXIS 249, at *78 (June 15, 2017) ("The Hurst decision

did not rest upon or even address the beyond-a-reasonable-doubt standard"); 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 require . . . findings beyond a reasonable doubt . . . that the aggravating factors outweighed the mitigating factors. . . . . Nothing in Hurst . . . affects our conclusions in this regard."); People v. Jones, 3 Cal. 5th 583, 618-619, 220 Cal.Rptr.3d 618, 398 P.3d 529 (2017); Ex parte Bohannon, 222 So.3d 525, 532-533 (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 Ohio8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Appellant's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. This Court allowed the rejection of Petitioners' argument by the California and Alabama Supreme Courts to stand. If this Court intended the overbroad view of Hurst suggested by Petitioners, certiorari would have been granted to give guidance to the lower courts.

Additionally, several federal district courts in Nevada have examined the issue in at least 6 capital cases so far and consistently held that Hurst cannot be "stretched" so far as to conclude that the reasonable doubt standard applies to the weighing process:

> Leonard's claim extends the holding in Hurst well beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing aggravating and mitigating circumstances is an "element" that must be submitted the jury.

Leonard v. Filson, D.Nev. No. 2:99-cv-0360-MMD-CWH, 2017 U.S. Dist. LEXIS 132801, at *6 (Aug. 18, 2017); see also Emil v. Filson, D.Nev. No. 3:00-cv-00654-KJD-VPC, 2017 U.S. Dist. LEXIS 175609, at *3-5 (Oct. 22, 2017) ("Emil's claim extends the holding in Hurst well beyond its cognizable bounds. Hurst does not hold, as Appellant claims, that the weighing aggravating and mitigating circumstances is an 'element' that must be submitted to the jury"; Hernandez v. Filson, D.Nev. No. 3:09-cv-00545-LRH-WGC, 2017 U.S. Dist. LEXIS 147103, at *3-6 (Sep. 11, 2017) ("Hernandez's claims extend the holding in Hurst beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing of aggravating and mitigating circumstances is an 'element' that must be submitted to the jury, or to which the reasonable doubt standard must apply").

Well before Hurst, every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating and mitigating circumstances has rejected it, reasoning that the weighing process constitutes not a factual determination, but a complex moral judgment. See United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States

v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005). Under Petitioners' interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published almost two years ago. The fact that not one of these leading cases on the issue was even mentioned by the Court in Hurst or since been overruled belies Petitioners' assertion that Hurst addressed such an issue. Nor did the Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." 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); see also United States v. Sampson, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that Kansas v. Carr undermines the claim that Hurst requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard). Clearly, Petitioners' interpretation of Hurst is against the great weight of authority. Another strong reason to reject Petitioners' 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 telling because Petitioners' view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances 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 v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047, 3055 (1990) [emphasis added]. If this Court intended the holding Appellant attributes to Hurst, it 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.").

In the Rauf opinion cited by Petitioners, the Delaware death penalty scheme was held unconstitutional because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity. Rauf v. State, 145 A.3d 430 (Del. 2016). While these decisions were "prompted" in part by the Hurst decision, the analysis actually required the court "to interpret not simply the Sixth Amendment itself, but the complex body of case law interpreting it," leading to "a diversity of views on exactly why the answers to the questions are what we have found them to be." Id. Specifically, Question 4 which applies the reasonable doubt burden of proof to the weighing process, there's nothing

in the Rauf opinion which cites to the Hurst case as the basis or reason for that particular decision. Id. In fact, the concurrences suggest that the beyond-a-reasonable-doubt standard applies to weighing because of historical analysis and the Delaware Constitution rather than as a direct requirement of Hurst. Id. at 481-2 (Strine, concur), 484-5 (Holland, concur).

Under Nevada law, weighing is only part of death "eligibility" to the extent a jury is precluded from imposing death if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstances. Lisle v. State, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). But this does not mean that weighing is part of the narrowing aspect of capital punishment the same as aggravating circumstances. Id. Instead, weighing, by definition, is part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the "selection" phase of the capital sentencing process. Id. Petitioners ignore that Nevada's use of the term, "eligibility," unlike the federal courts, has historically referred to both narrowing and individualized selection. Id. A State Supreme Court's interpretation and construction of its own state statutes is binding on all federal courts. See e.g., Ward v. Illinois, 431 U.S. 767, 772-73, 97 S. Ct. 2085, 2089 (1977); Hortonville Joint Sch. Dist. v. Hortonville Educ. Asso., 426 U.S. 482, 488, 96 S. Ct. 2308, 2312 (1976). Appellant is not at liberty to re-interpret Nevada

statutes in a manner inconsistent with the Nevada Supreme Court's own interpretation.

Notably, the Apprendi line of cases expressly acknowledge that they have no effect on sentence selection. See, e.g., Cunningham v. California, 549 U.S. 270 (2007) ("Other States have chosen to permit judges genuinely 'to exercise broad discretion ... within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal.") [internal citations omitted]. This is further supported by the expressly limited nature of Hurst's overruling of Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst only overrules Spaziano and Hildwin "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty," and that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 136 S. Ct. at 624. But in Spaziano, the Supreme Court also held that the Sixth Amendment right to trial by jury has no effect on sentence selection. Spaziano, 468 U.S. at 459-62. That holding from Spaziano remains undisturbed after Hurst, and Hurst thus has no impact on the weighing process that is part of the sentence selection process in Nevada.

Petitioner's contentions do not merit discretionary intervention by this Court because they fail to raise an important federal question and/or demonstrate a substantial conflict between inferior courts.

II. WERE THIS COURT TO CONSIDER PETITIONER'S CLAIMS, THERE IS STILL NO REASON TO INTERVENE BECAUSE PETITIONER'S CLAIMS ARE MERITLESS.

Even if this Court were willing to ignore its own rules and precedents in order to consider Petitioners' challenge to the Nevada Supreme Court's upholding standing precedent, there still is no reason for this Court to intervene since Petitioners' claims are meritless.

a. Hurst is Not Retroactive and Hurst is an application of Ring.

As explained supra, Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 136 S. Ct. at 621-22. The entirety of the Court's discussion in Hurst focused on applying Ring to the case before it. Id. This Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S. Ct. 2519, 2522-27 (2004). After an extensive analysis, the Court concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S. Ct. at 2526-27.

Accordingly, several other courts have concluded that Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d

1158, 1165 n.2 (11th Cir. 2017); Lambrix v. Secretary, 872 F.3d 1170, 1182-1183 (11th Cir.2017); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017); In re Coley, 871 F.3d 455 (6th Cir. 2017). Given the conclusion that Hurst is nothing more than an application of Ring, it necessarily follows that Hurst is not retroactive the same as Ring.

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS 649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof.").

It is important to note that this burden of proof issue is the entire point of Appellant's argument. This conclusion, by the only Court offering any support to Appellant's position, that his argument is fundamentally distinguishable from Hurst, should be fatal to his claim. Regardless, reliance upon the watershed rule of criminal procedure exception to the bar against retroactive application to final convictions is problematic 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). Petitioners' convictions were final with the remittiturs issued in 1997 and 1999 from their direct appeals. As such, neither Ring nor Hurst apply to this matter.

b. Neither appellate reweighing nor the selection decision implicate Hurst.

Either Petitioner is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on appeal of the denial of his second habeas petition violated Hurst. Both of these complaints are equally unpersuasive because the Nevada Supreme Court has rejected the view that the post-death eligibility selection decision is a factual determination.

Ring applied Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), to Arizona's death penalty scheme, which allowed a judge to determine whether a statutory aggravating circumstance existed. The Ring Court determined that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S. Ct. at 2443.

i. Appellate reweighing was appropriate

Appellate reweighing after invalidation of an aggravating circumstance is appropriate because it does not involve a factual determination. In Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), this Court found it constitutionally permissible for an appellate court to uphold a death sentence imposed by a jury upon invalidation of an aggravating factor, if the court conducts

a harmless error or a reweighing analysis. Id. at 744, 110 S. Ct. at 1446. While the Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," such review was constitutionally permissible. Id. at 754, 110 S. Ct. at 1451.

The Nevada Supreme Court resolved the question left to it by this Court as follows:

> A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. If this Court cannot conclude beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance, [the Nevada Supreme Court] must vacate the death sentence and remand the matter to the district court for a new penalty hearing.

Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) (footnote omitted).

Petitioners' radical expansion of Ring and Hurst would require abandonment of Clemons. Such an outcome is contrary to the great weight of authority. Indeed, this Court has arguably already rejected Petitioners' contention. Ring itself specifically noted that it "does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." Ring, 536 U.S. at 597, footnote 4, 122 S. Ct. at 2437, footnote 4. Both

Hurst and Ring noted the availability of harmless error review on remand. Hurst, 136 S. Ct. at 624; Ring, 536 U.S. at 609, footnote.7, 122 S. Ct. at 2443, footnote 7. Further, in Brown v. Sanders, 546 U.S. 212, 217, 126 S. Ct. 884, 890 (2006), this Court acknowledged the ability of courts in weighing states to engage in harmless error review or reweighing upon invalidating an aggravator. Brown applied a similar analysis to California's non-weighing death penalty scheme, determining that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Id. at 220, 126 S. Ct. at 892 (footnote omitted). The Court then determined that the invalidated aggravator "could not have 'skewed' the sentence, and no constitutional violation occurred." Id. at 223, 126 S. Ct. at 894.

The Nevada Supreme Court has relied upon Clemons to hold that reweighing in the face of an invalid aggravating circumstance was appropriate. Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000). Nevada is not alone among the states in approving of Clemons reweighing and/or harmless error review. State v. Abdullah, 158 Idaho 386, 470-71, 348 P.3d 1, 79 (2015); State v. Kirkland, 140 Ohio St. 3d 73, 86-87, 15 N.E.3d 818, 834 (2014); Gillett v. State, 148 So.3d 260, 267-69 (Miss. 2014); State v. Berger, 2014 SD 61 ¶ 31 n.8, 853 N.W.2d 45, 57 n.8 (2014);

State v. Hausner, 230 Ariz. 60, 84, 280 P.3d 604, 628 (2012); State v. Sandoval, 280 Neb. 309, 357-58, 364, 788 N.W.2d 172, 214-15, 218 (2010); Billups v. State, 72 So. 3d 122, 134 (Ala. Crim. App. 2010); People v. Mungia, 44 Cal. 4th 1101, 1139, 189 P.3d 880, 907 (2008); State v. Rice, 184 S.W.3d 646, 677 (Tenn. 2006); Myers v. State, 2006 OK CR 12, ¶¶ 105-115, 133 P.3d 312, 336-37 (Okla. Crim. App. 2006); Lambert v. State, 825 N.E.2d 1261, 1263 (Ind. 2005).

Appellate reweighing or harmless error review after invalidation of an aggravating circumstance does not implicate factual findings. In Clemons, this Court determined that, "[e]ven if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." Clemons, 494 U.S. at 752, 110 S. Ct. at 1450. Harmless error analysis is repeatedly and consistently applied in appellate review, and, while in Mississippi the jury was entrusted with the weighing determination, the appellate court was still entitled to review the verdict after invalidating a sentencing factor to determine whether it would remain the same. This holds true even after Ring.

That an appellate court merely utilizes the factual findings of a jury in conducting a reweighing or harmless error analysis fundamentally distinguishes this case from Ring and Hurst. This reality does not change merely because Clemons

noted that previous precedent had not required a jury to make the factual findings necessary to impose a death sentence since nothing about appellate reweighing or harmless error analysis invades the province of the jury in determining the existence of statutory aggravators that make a defendant death eligible. A jury's factual determination of whether a defendant is death eligible is *all* Ring requires, and the jury in both these cases made that decision.

Nor is appellate reweighing or harmless error analysis suddenly taboo merely because Hurst overruled Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984). Hildwin and Spaziano are no longer good law because "they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst 136 S.Ct. at 624. While Clemons relied on those cases in part, appellate reweighing and harmless error review comports with Ring, because the jury still finds the facts necessary to make a defendant death eligible (in Nevada, the existence of a statutory aggravator), and the appellate court does not serve to find new facts making a defendant eligible for the death penalty.

Most importantly, this Court has recently upheld its decision in Clemons. McKinney v. Arizona, 140 S. Ct. 702 (2020). In McKinney, the Ninth Circuit ruled that the Arizona Supreme Court had failed to properly weigh consider mitigating evidence and remanded the case back to the Arizona Supreme Court. Id. at 706. On

remand, the Arizona Supreme Court reweighed the aggravating and mitigating circumstances and upheld both McKinney's death sentences. Id. This Court held that such reweighing was permitted under Clemons. Id. at 707. This Court also held that Clemons is unaffected by the decisions in Hurst and Ring. Id. at 708 ("In short, Ring and Hurst did not require jury weighing of aggravating and mitigating circumstances, and Ring and Hurst did not overrule Clemons so as to prohibit appellate reweighing of aggravating and mitigating circumstances."). Additionally, this Court ruled that Ring and Hurst do not apply retroactively on collateral review. Id.

c. The reasonable doubt standard does not apply to weighing of aggravating and mitigating circumstances by a jury in imposing the Death Penalty and, thus, the Nevada Supreme Court did not violate Petitioners' rights.

The beyond-a-reasonable-doubt standard does not apply to the selection phase of a capital sentencing proceeding since it is not a factual determination. Nevada capital penalty proceedings comply with the requirements of Apprendi, Ring 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 [this Court] has referred to as the selection phase of the capital sentencing process." Lisle, 131 Nev. at 365-66, 351 P.3d at 732. This weighing is not a factual determination and is not subject to the beyond-a-reasonable-doubt standard. Nunnery, 127 Nev. at 772-76, 263 P.3d at 251-53. The 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. ___, 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). Accordingly, 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.

Because Clemons reweighing comports with the requirements of Ring and because Petitioners received all the protections required by Ring, the Nevada Supreme Court did not err in affirming the district court's denial of Petitioners' Petitions for Writ of Habeas Corpus. As Petitioners have provided this Court only meritless arguments, their Petitions must be denied.

CONCLUSION

Petitioners fail to establish that the exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such, this Court should deny certiorari.

Respectfully submitted.

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