No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

John Bejarano, Petitioner,

v.

William Gittere, Warden, et al., Respondent.

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTIONS PRESENTED

(Capital Case)

Nevada courts instruct juries that they may *consider* imposing a death sentence only after finding at least one statutory aggravating factor beyond a reasonable doubt *and* further finding that there are no mitigating circumstances sufficient to outweigh the aggravating factor or factors. If the Nevada Supreme Court later invalidates aggravating factors, it will then replicate the jury's second step, "reweighing" the remaining aggravating factors against any mitigating evidence. That is precisely what the Nevada Supreme Court did here, resulting in a decisions re-imposing the death penalty. The Nevada Supreme Court reasoned that this procedure is allowed by *Clemons v. Mississippi*—a decision predating this Court's *Apprendi* line of cases. The Nevada Supreme Court also held that the outweighing step was not an eligibility requirement, but rather a mechanism for the jury to retract a finding of death-eligibility.

The questions presented are:

1. Should this Court overrule *Clemons v. Mississippi* as inconsistent with *Apprendi* and its progeny, to the extent that it allows an appellate court to independently reweigh aggravating factors against mitigation to uphold a death sentence?

2. Did the Nevada Supreme Court violate Mr. Bejarano's rights by making the outweighing requirement an afterthought for the jury, used only to lessen a death sentence to life imprisonment?

LIST OF PARTIES

Petitioner John Bejarano is an inmate at Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent William Gittere is the warden of Ely State Prison.

LIST OF RELATED PROCEEDINGS

State v. Bejarano, Second Judicial District Court, Washoe County, Nevada, Case No. C87-678, Judgment (June 3, 1988)

Bejarano v. State, Nevada Supreme Court, Case No. 19023, Order Dismissing Appeal (809 P.2d 598 (December 22, 1988))

State v. Bejarano, Second Judicial District Court, Washoe County, Nevada, Case No. CV89-944, Order (September 5, 1989)

Bejarano v. State, Nevada Supreme Court, Case No. 20466, Opinion (801 P.2d 1388 (December 7, 1990)) (Per curiam)

Bejarano v. Ignacio, United States District Court, Case No. CV-S-91-574- PMP (LRL), Order Dismissing Mixed Petition (December 23, 1992)

Bejarano v. Hatcher, Seventh Judicial District Court, White Pine County, Nevada, Case No. HC-0361292, Order Dismissing Petition for Writ of Habeas Corpus (January 24, 1994)

Bejarano v. Warden, Nevada Supreme Court, Case No. 25459, Opinion (929 P.2d 922 (December 20, 1996))

Bejarano v. Warden, Second Judicial District Court, Washoe County, Nevada, Case No. C87P678, Order (October 7, 2004)

Bejarano v. Nevada, Nevada Supreme Court, Case No. 44297, Opinion (146 P.3d 265 (November 16, 2006)) (En banc)

Bejarano v. Del Papa, United States District Court, District of Nevada, Case No. 2:98-cv-01016-PMP-RJJ, Judgment in a Civil Case (September 2, 2010)

Bejarano v. Filson, Ninth Circuit Court of Appeals, Case No. 11-99000 (stayed)

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PETITION FOR WRIT OF CERTIORARI

In 2016, this Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), the latest of a long line of cases expanding the types of determinations that, under the Sixth and Fourteenth Amendments, must be made by a jury and proved beyond a reasonable doubt. In the wake of these cases, and this Court's steady expansion of Sixth and Fourteenth Amendment rights, confusion has run high among state courts and many important constitutional questions remain unanswered.

For example, the Delaware Supreme Court concluded *Hurst* invalidated its state's death-penalty statute, which assigned to the judge the task of weighing aggravating and mitigating circumstances. *See Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016). And the Colorado Supreme Court agreed that the outweighing finding must be made by a jury under *Hurst*'s predecessors. *See Woldt v. People*, 64 P.3d 256, 266–67 (Colo. 2003) (en banc) (concluding that Sixth Amendment protections extend to all factual findings on which a death sentence is predicated, including that there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved).

But other state supreme courts have, in quick succession, first interpreted *Apprendi* and its progeny expansively, before abruptly reversing course. For example, in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), the Florida Supreme Court initially held that *Hurst* required the jury to both find the existence of aggravating factors and perform the outweighing determination. But the court retreated from that holding just two months ago. *See Florida v. Poole*, 2020 WL

370302, No. SC18-145 at *11 (Fla. Jan. 23, 2020); *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. Sept. 5, 2019), *reh'g denied*, No. SC18-150, 2019 WL 6769599 (Fla. Dec. 12, 2019). The Nevada Supreme Court similarly decided after *Ring* that the Sixth Amendment required the jury to determine beyond a reasonable doubt whether mitigating evidence outweighed aggravating circumstances, *see Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), then overruled *Johnson* just nine years later, in *Nunnery v. State*, 263 P.3d 235, 250–54 (Nev. 2011). The Missouri Supreme Court also decided after *Ring* that the Sixth Amendment mandated a jury finding of outweighing beyond a reasonable doubt, *see State v. Whitfield*, 107 S.W.3d 253, 256–62 (Mo. 2003), then reversed course sixteen years later, *State v. Wood*, 580 S.W.3d 566, 582–88 (Mo. 2019).[1]

Overall, in the four years since *Hurst*, the state courts of every active death penalty state whose capital sentencing scheme involves judicial fact-finding have now ruled on whether the Sixth Amendment reserves such findings for the jury. This issue has therefore percolated sufficiently among the state courts to warrant this Court's review.

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[1] Academics also debate the scope of *Hurst*'s implications. *See* Craig Trocino & Chance Meyer, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt, 70 U. Miami L. Rev. 1118, 1145 (2016) ("[I]n light of *Hurst*, the ruling in *Clemons* no longer applies to appellate review of pre-*Hurst* Florida death sentences."); Carissa Byrne Hessick, William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. Rev. 448 (2019) (noting that "the precise scope of the decision is unclear" but arguing that *Hurst* invalidates several state capital-sentencing schemes); Jeffrey Wermer, *The Jury Requirement in Death Sentencing After Hurst v. Florida*, 94 Denv. L. Rev. 385, 387 (2017) (arguing that the different ways state courts have interpreted *Hurst* "illustrate the general confusion surrounding the U.S. Supreme Court's recent capital sentencing jurisprudence").

In recent terms, this Court has recognized that its Sixth Amendment jurisprudence remains unsettled. For example, this Court recently considered how to apply Sixth Amendment requirements to the area of federal supervised relief. *See United States v. Haymond*, 139 S. Ct. 2369 (2019). And this Court granted certiorari in *Ramos v. Louisiana* to address whether the Fourteenth Amendment fully incorporates the Sixth Amendment's guarantee of a unanimous jury verdict. *See Louisiana v. Ramos*, 257 So.3d 679 (La. 2018), *cert. granted*, 139 S. Ct. 1647 (2019).

Most recently, this Court granted certiorari in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), wherein the Court opined, in dicta, regarding the ability of appellate judges to reweigh a petitioner's death sentence. *See id.* at 707-08.[2] But even *McKinney* did not present an adequate vehicle for this Court to consider the continuing validity of *Clemons* because Arizona law at the time permitted judicial fact-finding and weighing under state law was not a condition precedent to consideration of death as a sentencing option. *See* Section A (under reasons for granting the writ), below. This case does not present the same impediments.

This Court should grant this Petition for Writ of Certiorari to settle the important questions of federal law it raises and provide critical guidance to state courts with capital sentencing schemes.

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[2] In *McKinney*, the question the Court decided was whether the state court's characterization of a proceeding as direct review or collateral in nature was determinative of the law to be applied in the petitioner's case. *McKinney*, 140 S. Ct. at 708.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming the denial of Mr. Bejarano's post-conviction petition is reported at 448 P.3d 551, 2019 WL 4447243 (Nev. 2019) (unpublished table disposition). It is also reprinted in the Appendix of the Petition ("Pet. App.") at Pet. App. 2-3. The order denying rehearing is unpublished and is reprinted in the Appendix at Pet. App. 1.

JURISDICTION

The Nevada Supreme Court's order of affirmance in Mr. Bejarano's case was issued on September 13, 2019, and a timely petition for rehearing was denied on November 7, 2019. On January 28, 2020, Justice Kagan extended the time to file a petition for writ of certiorari until and including April 3, 2020.

This Court has statutory jurisdiction for both cases under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

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

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

Nevada Revised Statutes § 175.554 provides in, pertinent part:

> 2. The jury shall determine:
>
> (a) Whether an aggravating circumstance or circumstances are found to exist;
>
> (b) Whether a mitigating circumstance or circumstances are found to exist; and
>
> (c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.
>
> 3. The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Nevada Revised Statutes § 200.030 provides in, pertinent part:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances

STATEMENT OF THE CASE

Nevada law provides that a defendant cannot be exposed to the death penalty unless a jury finds both that at least one aggravating circumstance exists and that the mitigating evidence does not outweigh the aggravating circumstance or circumstances. *See Lisle v. State,* 351 P.3d 725, 732 (Nev. 2015) (explaining that

there is "a relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances."); *Middleton v. State*, 968 P.2d 296, 314–15 (Nev. 1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."); Nev. Rev. Stat. § 175.554(3) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."); Nev. Rev. Stat. § 200.030(4)(a) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

Although the Nevada Supreme Court has repeatedly held that the weighing determination is a condition precedent to the jury's *consideration* of the death penalty, it has also concluded that the weighing determination is not subject to proof beyond a reasonable doubt. As evidenced most recently in Mr. Bejarano's case, this position conflicts with this Court's *Apprendi* line of cases.

A. Mr. Bejarano is sentenced to death under an uncertain burden of proof.

Mr. Bejarano was convicted of, among other things, first-degree murder. The court instructed the jury it could consider imposing a sentence of death "only if the jury finds one or more aggravating circumstances have been proved beyond a reasonable doubt and the jury finds that any mitigating circumstances do not weigh

the aggravating circumstances." The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt.

In Mr. Bejarano's case, the jury found six aggravating circumstances: (1) under sentence of imprisonment; (2) previous felony conviction involving the use or threat of violence (1979 conviction for aggravated assault); (3) previous felony conviction involving the use or threat of violence (1981 conviction for aggravated assault); (4) murder was committed during the course of a robbery; (5) the murder was committed to avoid or prevent a lawful arrest; and (6) the murder was committed for the purpose of receiving money or any other thing of monetary value. The jury concluded that the mitigating evidence did not outweigh the aggravating factors and, having done so, further determined that death was the appropriate punishment.

B. The Nevada Supreme Court strikes aggravating factors in both cases but reweighs and affirms.

The Nevada Supreme Court affirmed Mr. Bejarano's convictions and death sentence on direct appeal. *See Bejarano v. State*, 809 P.2d 598 (Nev. 1988). Mr. Bejarano filed a third state habeas petition in 2004 where he argued, among other things, that two of his aggravating circumstances were invalid. The state court denied the petition, and Mr. Bejarano timely appealed to the Nevada Supreme Court.

The Nevada Supreme Court struck two of the six aggravating circumstances found by the jury: (1) that the murder was committed during a robbery; and (2) that the murder was committed to receive money or any other thing of monetary value. *Bejarano v. State*, 146 P.3d 265, 274-75 (Nev. 2006). The court then reweighed the remaining four aggravating factors against the mitigating evidence and found the mitigation insufficient to avoid death eligibility. *Id.* at 276-77.

C. This Court issues *Hurst v. Florida*, and Bejarano seeks relief.

In *Hurst v. Florida*, this Court invalidated Florida's death-penalty scheme and held a jury must find beyond a reasonable doubt all conditions precedent to imposing a death sentence—not just the presence of an aggravating circumstance. 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt").

Based on *Hurst*, Mr. Bejarano filed a new habeas petition, arguing that *Hurst* rendered his death sentences unconstitutional in two ways: (1) it was unconstitutional for the Nevada Supreme Court, not a jury, to reweigh the aggravating circumstances and mitigating evidence after striking invalid aggravators on appeal; and (2) it was unconstitutional for the trial court not to instruct the jury that the prosecution must prove mitigation does not outweigh aggravation beyond a reasonable doubt.

D. The Nevada Supreme Court sidesteps the *Hurst* claims and creates new constitutional problems.

On September 13, 2019, the Nevada Supreme Court affirmed the denial of Mr. Bejarano's petition for writ of habeas corpus.[3] The court cited to its recent opinion in *Castillo v. State*, 442 P.3d 558 (Nev. 2019), in denying the petition. 2019 WL 4447243.

In *Castillo*, the court first distinguished between "factual determinations" and "moral choices." 442 P.3d at 559-61. Only pure factual questions, the court held, are susceptible to proof beyond a reasonable doubt. *Id.*[4] The court then recharacterized the second step in Nevada's capital sentencing scheme, explaining that it does not render a defendant "eligible" for the death penalty, but rather walks back over the line an already-death-eligible defendant. *Id. Castillo* also rejected the

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[3] Although the Nevada Supreme Court denied Mr. Bejarano's petition on the basis of procedural default, those procedural bars were intertwined with federal Sixth Amendment law. *See Bejarano v. Filson*, 2019 WL 4447243 (Nev. 2019) (holding that Mr. Bejarano failed to overcome procedural bars, because Bejarano's arguments regarding *Hurst* lacked merit, citing *Castillo v. State*, 442 P.3d 558 (Nev. 2019). Because the Nevada Supreme Court reached the merits of Bejarano's federal claim, this Court is not precluded from reviewing the issues presented here. *See Rippo v. Baker*, 137 S. Ct. 905, 907, fn. * (2017) (holding that this Court could review the Petitioner's claim because the Nevada Supreme Court did not invoke any state law grounds that were independent of the federal claim (citing *Foster v. Chatman*, 136 S.Ct. 1737, 1746 (2016)).

[4] This Court in dicta previously made a similar distinction, but exclusively under the Eighth Amendment, not under the Sixth Amendment. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Under the Sixth Amendment, unlike the Eighth, labels like "factual determination" and "moral determination" are meaningless; what matters is only whether the determination "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); *see Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975).

reweighing argument, holding that *Clemons* is binding authority until this Court overturns it. *Id.*

In reaching these conclusions, the Nevada Supreme Court deprived Mr. Bejarano of his right to a jury trial and of proof by the beyond a reasonable doubt of every element of the capital offense.

REASONS FOR GRANTING THE PETITION

As legal commentators, state courts, and federal courts have already realized, *Clemons v. Mississippi* conflicts with this Court's more-recent line of Sixth Amendment cases. Specifically, *Clemons* allows appellate judges to do what trial judges cannot—usurp the role of juries to find facts increasing a potential sentence from life imprisonment to death. But only this Court can overrule its own precedent. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (*quoting Hohn v. United States*, 524 U.S. 236, 252–53 (1998)). This Court should take this opportunity to reconcile its Sixth Amendment jurisprudence by overruling *Clemons*. *See* U.S. Sup. Ct. R. 10(a)–(c).

This Court should also grant certiorari because the Nevada Supreme Court's reasoning conflicts with this Court's decisions in *Andres v. United States*, 333 U.S. 740 (1948) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *See* U.S. Sup. Ct. R. 10(c) (compelling reasons exist to grant review in cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this

Court"). Moreover, this Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court," *i.e.*, to clarify its Sixth Amendment jurisprudence and bring *Andres* and *Mullaney* into its more recent Sixth Amendment analysis. *See* U.S. Sup. Ct. R. 10(c).[5]

A. This Court should resolve the important constitutional issue whether appellate reweighing violates the Sixth Amendment right to a jury trial, and, consequently, whether *Clemons v. Mississippi* remains good law.

In *Clemons v. Mississippi*, this Court sanctioned "reweighing," allowing appellate courts to uphold a death sentence after striking aggravating factors by weighing any remaining aggravating factors against mitigating circumstances. *Clemons v. Mississippi*, 494 U.S. 738, 746–50 (1990); *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020). But the following three decades saw the slow erosion of the legal basis for *Clemons*, starting with *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Nevertheless, the Nevada Supreme Court has continued relying on *Clemons*, pointing out that only this Court can overrule its previous cases. *See* App. 2 (citing *Castillo v. State*, 442 P.3d 558, 561 n.2 (Nev. 2019)). In light of this continued reliance, to the detriment of several inmates on Nevada's death row, this Court should reexamine and overrule *Clemons*, as it no longer adheres to the Sixth Amendment right to a jury trial.

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[5] This Court has not applied Sixth Amendment principles to a situation where a jury is instructed to qualify a verdict to prevent a defendant from exposure to the death penalty since it decided *Andres* in 1948.

1. *Apprendi* and its progeny have eviscerated the Sixth Amendment ruling in *Clemons*.

It is axiomatic that "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Sochor v. Florida*, 504 U.S. 527, 532 (1992). In *Clemons*, however, this Court concluded that courts could nevertheless affirm a death sentence founded, in part, on an invalid aggravating circumstance by independently reviewing the evidence in aggravation and mitigation and affirming if the death sentence is still factually supported. 494 U.S. at 741, 745. This approach, however, is no longer viable.

This Court's approval of appellate reweighing in *Clemons* was founded in its pre-*Apprendi* Sixth Amendment jurisprudence, which permitted judicial factfinding in capital sentencing. *See Clemons*, 494 U.S. at 746. First, in *Spaziano v. Florida*, this Court held a trial judge does not violate the Sixth Amendment by overriding a jury's recommendation of life. 468 U.S. 447, 458–65 (1984). This Court expanded the reasoning of *Spaziano* in *Hildwin v. Florida*, holding that trial judges may "make the written findings that authorize imposition of a death sentence," including the finding of a statutory aggravating factor. 490 U.S. 638, 639–40 (1989). So, at the time this Court decided *Clemons*, "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence [had] been soundly rejected by prior decisions of this Court." *Clemons*, 494 U.S. at 745. And, as this Court further explained, nothing in

Sixth Amendment law, as it existed in 1990, "require[d] that a jury specify the aggravating factors that permit the imposition of capital punishment." *Id.* In a decision issued shortly after *Clemons*, this Court relied heavily on *Clemons* to uphold Arizona's capital-sentencing scheme, which allowed the trial judge, not the jury, to find aggravating factors supporting a death sentence. *See Walton v. Arizona*, 497 U.S. 639, 647–49 (1990).

Thus, in *Clemons*, appellate reweighing was deemed permissible only because this Court, in 1990, generally approved of judicial factfinding in capital sentencings. But this Court changed course in 2000, when it decided *Apprendi v. New Jersey*, holding that the Sixth Amendment required juries, not judges, to make any finding that increases a potential sentence above the statutory maximum. 530 U.S. 466, 476–97 (2000). This Court further noted that it was immaterial whether the state referred to the finding as an "element" or a "sentencing factor": "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

Two years later, in *Ring v. Arizona*, this Court applied these principles to Arizona's capital-sentencing scheme, which allowed a sentence of death if a judge, not a jury, found the existence of at least one aggravating factor. 536 U.S. 584, 592 (2002). Without the finding of an aggravating factor, the maximum punishment under Arizona law for first-degree murder was life imprisonment. *Id.* at 597. Relying on *Apprendi*, this Court concluded that the existence of an aggravating

factor in Arizona, because it increased the "punishment beyond the maximum authorized by a guilty verdict standing alone," was the "'functional equivalent of an element of a greater offense.'" *Id.* at 605, 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). Hence, this Court held that the existence of an aggravating factor had to be found by a jury, not a judge, under the Sixth Amendment. *Id.* at 609. This Court explicitly overruled *Walton* as "irreconcilable" with this holding, adding that this Court's "Sixth Amendment jurisprudence cannot be home to both." *Id.* at 588–89, 609.

Next, in *Hurst*, this Court concluded that all sentencing findings must be submitted to the jury and proven beyond a reasonable doubt when they are required as a condition precedent to the jury's ability to consider death as a sentencing option. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *see also id.* at 622 ("Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty."). In Florida, as in Nevada, this included two findings: "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 622 (alterations in original) (quoting former Fla. Stat. § 921.141(3)). But both these findings ultimately were made by a judge, with only a nonbinding recommendation from the jury. *Id.* So, in Florida, the statutory maximum penalty authorized by a jury's verdict alone was life imprisonment. *Id.* This Court held that this scheme violated the Sixth Amendment. *Id.* at 619. Because the eligibility

determination "'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict,'" this Court concluded that it is an "element" that, under the Sixth Amendment, "must be submitted to the jury." *Id.* at 621–22 (alteration in original) (quoting *Apprendi*, 530 U.S. at 494). This Court concluded by overruling both *Spaziano* and *Hildwin*, explaining that "[t]ime and subsequent cases have washed away [their] logic." *Id.* at 624.

Finally, in *Haymond*, this Court expanded Sixth Amendment protections to proceedings concerning revocation of supervised release. 139 S. Ct. 2369. In doing so, this Court described the basis of the right to a jury trial, describing it "as one of the Constitution's most vital protections against arbitrary government." *Id.* at 2373. The right to a jury trial, this Court explained, "preserve[s] the people's authority over its judicial functions," just as the right to vote "preserve[s] the people's authority over their government's executive and legislative functions." *Id.* As a result, the right to a jury determination of "elements" of an offense—as that term is defined by *Apprendi*—applies not just to the original trial, but also to later proceedings, including attempts by the government to revoke supervised release and return a defendant to prison. *Id.* at 2373–78.

In sum, this Court in *Hurst* and *Haymond* finished what it began in *Apprendi*, eviscerating the legal underpinnings of *Clemons*. *See State v. Kirkland*, 15 N.E.3d 818, 850–51 (Ohio 2014) (O'Neill, J., dissenting) (opining "that *Clemons* is bad law that will someday be explicitly overruled"); *Baston v. Bagley*, 420 F.3d 632, 639 n.1 (6th Cir. 2005) (Merritt, J., dissenting) ("[I]t seems very likely that

Ring has overruled *Clemons*."); *see also Craig Trocino & Chance Meyer, Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. Miami L. Rev. 1118, 1143–62 (2016) (arguing that *Clemons* does not survive *Hurst*); Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. Pa. J. Const. L. 529, 581 n.2 (2011) ("*Clemons v. Mississippi* holds that . . . reweighing was consistent with the Court's Sixth Amendment jurisprudence as it existed in 1990 . . . . However, it seems beyond peradventure that such a process violates the Court's post-*Ring* understanding of the Sixth Amendment."); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1130–35 (2003) ("[T]he validity of *Clemons*'s holding and reasoning are highly suspect in light of *Ring*."). Just as it violates the Sixth Amendment for a trial judge to independently find prerequisites to consideration of the death penalty, it also violates the Sixth Amendment for an appellate court to make those findings in order to affirm a sentence of death. Moreover, because the Sixth Amendment right to a jury incorporates the Due Process right to have that jury make findings beyond a reasonable doubt, *see Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), an appellate court's failure to assign the burden of proof to the State and apply the reasonable-doubt standard when reweighing effectively repeats the error committed in the trial court. And the Nevada Supreme Court does not even have to be unanimous in its decision as a jury would under state law. *See Gillett v. State*, 148 So.3d 260, 268 (Miss. 2014)

(recognizing "glaring inconsistency" between unanimity requirement and majority appellate reweighing).[6]

This Court recently opined, in dicta, regarding the validity of *Clemons* as applied to a capital case in Arizona that was final before the Court decided *Ring*. *See McKinney*, 140 S. Ct. 702. In *McKinney*, this Court concluded that *Clemons* remained good law in Arizona for a petitioner whose conviction was final before *Ring*. *McKinney*, 140 S. Ct. at 707–08. But this Court also explained that the issue it was deciding was "narrow," *id.* at 706—it involved a unique procedure in a state, Arizona, with a different capital sentencing scheme. *Id.* Importantly, Arizona does not have Nevada's three-step capital sentencing statute. *See* Ariz. Rev. Stat. § 13-752.

In addition, until this Court decided *Ring*, trial judges in Arizona, not juries, decided whether aggravating circumstances existed and death was warranted. *See McKinney*, 140 S. Ct. at 706. Thus, this Court's determination that appellate judges in Arizona could perform the weighing step is law for Arizona, but nonbinding dicta for states like Nevada (particularly after *Ring*). *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007); *cf. Valerio v. Crawford*, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (distinguishing between appellate factfinding when original factfinder was judge versus when original factfinder was

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[6] This Court recently granted certiorari in *Ramos v. Louisiana* to address whether the Fourteenth Amendment fully incorporates the Sixth Amendment's guarantee of a unanimous jury verdict. *See Louisiana v. Ramos*, 257 So.3d 679 (La. 2018), *cert. granted*, 139 S. Ct. 1647 (2019).

jury). Just as appellate judges can no longer find the existence of an aggravating factor in Arizona, because that is the role of juries post-*Ring*, appellate judges in Nevada cannot perform *either* prerequisite for consideration of the death penalty in Nevada, i.e., the finding of aggravators or outweighing.

This is an important issue of federal constitutional law, involving the interpretation of this Court's precedent. This Court should take this opportunity to reconcile its Sixth Amendment jurisprudence. *See* Sup. Ct. R. 10(c); *cf. Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

2. State courts are divided whether to allow appellate reweighing after *Apprendi* and *Ring*.

Courts are divided on their treatment of appellate reweighing under *Clemons*. Some courts have concluded that appellate reweighing is not an appropriate remedy after striking an invalid aggravating factor. *See Gillett*, 148 So.3d at 267–69 (recognizing "glaring inconsistency between . . . longstanding sentencing scheme, which allows a death sentence to be imposed only by a unanimous jury, and the legislative directive that a mere majority of [the Mississippi Supreme] Court can reweigh evidence and impose a death sentence"); *cf. State v. Reeves*, 604 N.W.2d 151, 164–68 (Neb. 2000) (disallowing appellate

reweighing as violating due process, as no statutory authority existed for appellate court to act as "unreviewable sentencing panel").

But some courts allow appellate reweighing, despite the changes in Sixth Amendment law from this Court after *Clemons*. *See e.g.*, *Baston v. Bagley*, 420 F.3d 632, 636–37 (6th Cir. 2005); *State v. Berget*, 853 N.W.2d 45, 57 & n.8 (S.D. 2014); *State v. Kirkland*, 15 N.E.3d 818, 834, 841 (2014); *Myers v. State*, 133 P.3d 312, 336–37 (Okla. Crim. App. 2006), *overruled on other grounds by Davis v. State*, 419 P.3d 271 (Okla. Crim. App. 2018); *Lambert v. State*, 825 N.E.2d 1261, 1263 (Ind. 2005). This group includes Nevada, which soon after *Clemons* was issued accepted its invitation to conduct appellate reweighing. *See, e.g., Castillo*, 442 P.3d at 131 n.2; *Chappell v. State*, 972 P.2d 838, 942 (Nev.1998); *Leslie v. State*, 952 P.2d 966, 976 (Nev. 1998); *Witter v. State*, 921 P.2d 886, 900–01 (1996), *abrogated on other grounds by Nunnery v. State*, 263 P.3d 235 (2011); *Canape v. State*, 859 P.2d 1023, 1031 (Nev. 1993).[7] But even the members of these courts have been internally conflicted whether appellate reweighing is permitted. *See Baston*, 420 F.3d at 639–41 & n.1 (Merritt, J., dissenting); *Kirkland*, 15 N.E.3d at 849–51 (O'Neill, J., dissenting); *Lambert*, 825 N.E.2d at 1266–67 (Ricker, J., dissenting); *see also*

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[7] In *State v. Haberstroh*, 69 P.3d 676, 682–83 (Nev. 2003), the Nevada Supreme Court muddled the distinction between reweighing and harmless-error review. The two standards of review, however, are fundamentally different in their approach, their degree of deference to the rights of the defendant, and their constitutionality. In practice, the hybrid method endorsed by the Nevada Supreme Court confuses the two standards, involves independent judicial factfinding on a standard less than beyond a reasonable doubt, and, as a result, violates the Sixth Amendment and the Due Process Clause.

Lambert v. McBride, 365 F.3d 557, 561–63 (7th Cir. 2004) (questioning validity of appellate reweighing after *Ring*).

These divergent views affect the fairness and reliability of capital sentencing proceedings across the country. Unlike juries, appellate courts see only a "cold record," and they are often ill equipped to make the sorts of factual judgments inherent in weighing decisions. *See Gillett*, 148 So.3d at 268; *see also Caldwell v. Mississippi*, 472 U.S. 320, 330–31 (1985). This Court should grant the instant petition for writ of certiorari in order to resolve this conflict. *See* Sup. Ct. R. 10(a), (b).

3. This case represents the appropriate vehicle for this Court to reconsider *Clemons*.

For two reasons, this case represents an appropriate vehicle for this Court to consider whether *Clemons* remains good law. First, Nevada's three-step capital sentencing scheme represents the perfect opportunity to consider whether appellate courts under the Sixth Amendment can "reweigh" aggravating factors and mitigating evidence, since weighing in Nevada is a necessary prerequisite to the ultimate sentencing decision—not the sentencing decision itself. Specifically, before being able to consider whether to impose the death penalty, juries in Nevada must make two separate determinations: the jury is required to find the existence of "at least one aggravating circumstance," and it must further "find" whether any "mitigating circumstances [are] sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). Only if both requirements are met is a

defendant exposed to the death penalty as a sentencing option. *See id.*; *see also* NRS 200.030(4)(a) (allowing death penalty "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances"); *Middleton v. State*, 968 P.2d 296, 314–15 (Nev. 1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible.").

Although the Nevada Supreme Court has attempted to reclassify the second step as a "selection" determination, *see Castillo*, 442 P.3d at 560–61 & n.1; *Lisle v. State*, 351 P.3d 725, 732 (Nev. 2015), it does so by elevating form over effect, focusing almost entirely on the semantic differences between facts and non-facts, and between eligibility and selection. *See Lisle*, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting) (accusing the majority of engaging in "semantic gymnastics in order to conclude that Nevada's death penalty scheme is something other than what the statutes plainly make it"). This Court has consistently held that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494; *see United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (explaining that a State cannot avoid the Sixth Amendment by labeling the process "a judicial sentencing enhancement" (citation and internal quotation marks omitted)); *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts

essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."); *Mullaney*, 421 U.S. at 699 (rejecting semantic distinction between elements of crime and sentencing factors and explaining that this Court's precedent "is concerned with substance rather than this kind of formalism"). And the effect of Nevada's "relatively unique" three-step capital-sentencing scheme is to make the weighing determination a prerequisite to increasing the potential sentence from life imprisonment to death, as it "precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances." *Lisle v. State*, 351 P.3d 725, 732 (Nev. 2015).[8]

Second, this case includes clear appellate factfinding. After striking two of six aggravating factors in Mr. Bejarano's case, the Nevada Supreme Court considered the mitigating circumstances, including that Bejarano earned his GED diploma, was the son of immigrant parents, that both his parents died before Bejarano reached the age of six, that Bejarano moved from foster home to foster homes, and

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[8] At the time this Court decided *Hurst*, nine states, including Nevada and Florida, had this "relatively unique" capital sentencing scheme. *See* Ark. Code § 5-4-603; Col. Rev. Stat. § 18-1.3-1201; Fla. Stat. § 921.141; Miss. Code § 99-19-101; Mo. Ann. Stat. § 565.030; N.C. Rev. Stat. § 15A-2000; Nev. Rev. Stat. §§ 175.554(3), 200.030(4); Tenn. Code § 39-13-204; Utah Code § 1953 76-3-207. Four of these states require the jury to make the antecedent "weighing" determination beyond a reasonable doubt. *See* Ark. Code § 5-4-603; N.C.P.I.-CRIM. 150.10; Tenn. Code § 39-13-204; Utah Code § 1953 76-3-207; *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990). Missouri required this determination to be made beyond a reasonable doubt until 2019, when it abrogated *Whitfield*, 107 S.W.3d 253. *See Wood*, 580 S.W.3d at 582–88.

that Bejarano's IQ was in the borderline range. *Bejarano*, 146 P.3d at 276. But the Nevada Supreme Court determined that these factors were not "particularly compelling." The Nevada Supreme Court decided Mr. Bejarano's sentence based on its own judgment about the relative weight of mitigating evidence against the aggravating circumstances —a decision that, based on the convergence of Nevada law and this Court's precedent, should have been made by the jury.

Under *Apprendi*, *Ring*, and *Hurst*, this Court should overrule *Clemons* and disallow appellate reweighing in capital cases. *See Ring*, 536 U.S. at 608 (explaining that precedent can be overruled under appropriate conditions); *Alleyne v. United States*, 570 U.S. 99, 118–19 (2013) (Sotomayor, J., concurring) (same).

B. This Court should clarify and consolidate its Sixth Amendment jurisprudence to bring *Andres* and *Mullaney* into the fold with *Apprendi* and its progeny.

The Nevada's Supreme Court's latest interpretation of Nevada's capital-sentencing scheme means that a jury renders a defendant death eligible after the first step but can walk back that determination of death-eligibility in the second step. This decision conflicts with this Court's jurisprudence in two cases: *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684, 684–85 (1975). When considered together, *Andres* and *Mullaney* establish that the burden remains on the State to prove each element of a capital offense beyond a reasonable doubt; the burden cannot be on the jury to qualify or undo a finding of death eligibility.

1. The Nevada Supreme Court's ruling is contrary to *Andres* and *Mullaney*, which establish that juries advance findings in rendering a verdict.

The Nevada Supreme Court's reformulation of the state's capital-sentencing law requires that the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, use the outweighing determination to "walk-back" a death-eligibility finding to a life sentence. *See Castillo*, 442 P.3d at 561. This reformulation conflicts with a line of this Court's precedent applying the Sixth Amendment and demands this Court's intervention. *See* U.S. Sup. Ct. R. 10(c) (listing, as a compelling reason to grant review, cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this Court").

This Court first considered in *Andres v. United States* the interpretation of a federal statute that required a unanimous jury to "walk back" a sentence of death to a sentence of life. 333 U.S. 740 (1948). The federal death-penalty statute at the time, 18 U.S.C. § 567, allowed jurors to "qualify" a guilty verdict by adding "without capital punishment." *Andres*, 333 U.S. at 742 n.1 (quoting 18 U.S.C. § 567). If the jury did not qualify the guilty verdict, the death penalty was automatic. *Id.* This Court rejected a construction of the statute "whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* at 748–48. Instead, this Court explained, the jury must decide unanimously on guilt and then decide unanimously that death was warranted. *Id.*

This Court's holding in *Andres* is significant because it rejected the government's attempt to treat the jury's ability to qualify a verdict as a mere afterthought, or "walk-back" mechanism. To the contrary, this Court held that it was an important issue left to the jury, because "a verdict embodies in a single finding the conclusion by the jury upon all questions submitted to it." *Id.* at 884.

The Nevada Supreme Court's decision in Mr. Bejarano's case conflicts with *Andres*, reaching the exact opposite conclusion; instead of treating the second outweighing determination as an important issue to embody a single verdict, the Nevada Supreme Court treats the outweighing determination as a mere afterthought for the jury. The Nevada Supreme Court has created a sentencing scheme where a jury must unanimously determine the first step of death eligibility, but can then alleviate eligibility's rigor in the next.

This new system also raises due process implications that conflict with another decision of this Court. In *Mullaney v. Wilbur*, this Court considered a Maryland statute that required a defendant to prove he acted "'in the heat of passion on sudden provocation' in order to reduce . . . homicide to manslaughter," *i.e.*, to "walk back" a homicide to manslaughter by proving an affirmative defense at sentencing. 421 U.S. 684, 684–85 (1975). This Court addressed two aspects of the Maryland statute: (1) the defendant had the burden of proving heat of passion, and (2) the statute did not require proof beyond a reasonable doubt. *Id.* at 696–701. Because the absence of heat of passion significantly increased the defendant's potential sentence, this Court concluded that both aspects of the Maryland statute

violated due process. *Id.* "This is an intolerable result," this Court explained, "in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703–04.

This Court also rejected an argument that the burden should remain with the defendant "because of the difficulties in negating an argument that the homicide was committed in the heat of passion." *Id.* at 701. "No doubt this is often a heavy burden," the Court acknowledged, but "[t]he same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial." *Id.* The Constitution requires the State prove the absence of heat of passion beyond a reasonable doubt, as "this is the traditional burden which our system of criminal justice deems essential." *Id.*

In combination, *Andres* and *Mullaney* show that the construction of Nevada's capital sentencing statutes by the Nevada Supreme Court violates Mr. Bejarano's constitutional rights to due process and a jury verdict. The outweighing determination is a prerequisite to the jury considering a death sentence. *See Lisle*, 351 P.3d at 732. And it violates the Due Process Clause and the Eighth Amendment to make this requirement an afterthought for the jury, used only to qualify death eligibility under an uncertain burden of proof. *See Mullaney*, 421 U.S. at 703–04.

2. This Court should answer an important federal question.

This reading of *Andres* and *Mullaney* answers an important federal question: can a capital sentencing jury walk back an eligibility finding under an uncertain

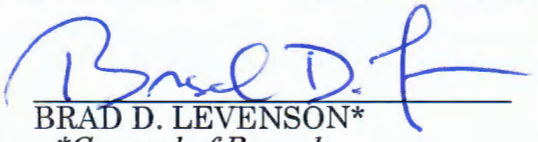
burden of proof? *Andres* and *Mullaney* prohibit the Nevada Supreme Court's conclusion that a jury can do so. This Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court," to give guidance to other states with capital punishment schemes. *See* U.S. Sup. Ct. R. 10(c).

CONCLUSION

Because the Nevada Supreme Court's decision in Mr. Bejarano's case implicates important questions of federal constitutional law, the petition for a writ of certiorari should be granted and the Nevada Supreme Court's decision should be reversed.

DATED this 26th day of March, 2020.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender of Nevada



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CASES INVOLVING SIMILAR LEGAL ISSUES

Because of the Nevada Supreme Court's incorrect interpretation of this Court's Sixth Amendment precedent, the following inmates on Nevada's death row have pending claims arguing they were sentenced based on an unconstitutional statute that improperly requires a jury to qualify a finding of death eligibility:

- *Castillo v. Nevada*, United States Supreme Court Case No. 19-7647
- *Doyle v. Nevada*, United States Supreme Court Case No. 19-7647
- *Bollinger v. Nevada*, Nevada Supreme Court Case No. 76853
- *Chappell v. Nevada*, Nevada Supreme Court Case No. 77002
- *Emil v. Nevada*, Nevada Supreme Court Case No. 73461
- *Hernandez v. Nevada*, Nevada Supreme Court Case No. 73620
- *Howard v. Nevada*, Nevada Supreme Court Case No. 73223
- *Johnson v. Nevada*, Eighth Judicial District of Nevada Case No. A-19-789336-W
- *Leonard v. Nevada*, Nevada Supreme Court Case No. 79780
- *Maestas v. Nevada*, Eighth Judicial District of Nevada Case No. A-19-806078-W
- *Powell v. Nevada*, Nevada Supreme Court Case No. 74168
- *Smith v. Nevada,* Nevada Supreme Court Case No. 73373
- *Thomas v. Nevada*, Nevada Supreme Court Case No. 77345
- *Walker v. Nevada*, Nevada Supreme Court Case No. 75013
- *Ybarra v. Nevada*, Nevada Supreme Court Case No. 72942

Several of these inmates were also resentenced to death by the Nevada Supreme Court acting as factfinders.

APPENDIX

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN BEJARANO,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY STATE PRISON; AND ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL,
Respondents.

No. 76629

FILED

SEP 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Appellant filed his petition on January 9, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *See Bejarano v. State*, Docket No. 19023 (Order Dismissing Appeal, December 22, 1988). The petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, because appellant previously sought postconviction relief, *Bejarano v. State*, 106 Nev. 840, 801 P.2d 1388 (1990), the petition was successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. *See* NRS 34.810(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars, and that a fundamental

miscarriage of justice would result if his petition was not considered, because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth new retroactive rules that: (1) require trial courts to instruct jurors that the State must prove that the aggravating circumstances are not outweighed by the mitigating circumstances beyond a reasonable doubt, and (2) prohibit the reweighing of aggravating and mitigating circumstances when an aggravating circumstance is stricken by a reviewing court. We disagree. *See Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the arguments that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures or to appellate reweighing); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures), *cert. denied*, 139 S. Ct. 415 (2018). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

cc: Hon. Kathleen M. Drakulich, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN BEJARANO,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY STATE PRISON; AND ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL,
Respondents.

No. 76629

FILED

NOV 07 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

, C.J.
Gibbons

, J.
Pickering

, J.
Hardesty

, J.
Parraguirre

, J.
Stiglich

, J.
Cadish

, J.
Silver

cc: Hon. Kathleen M. Drakulich, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

19-45878