No. 19-8192

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

John Bejarano, Petitioner,

v.

William Gittere, Warden, et al., Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner John Bejarano presented two questions for this Court to consider. The first concerned whether this Court should overrule *Clemons v. Mississippi*, 494 U.S. 738 (1990), and the second concerned whether the Nevada Supreme Court violated Mr. Bejarano's constitutional rights by rendering the outweighing determination an afterthought for the jury, used only to lessen a death sentence to life imprisonment.

The State does not dispute that this Court's review is warranted to address a conflict among the state courts on the important federal question presented here. Other than asserting that there is no conflict, BIO at 10, the State makes no attempt to address the authorities cited by Mr. Bejarano which show the existence of a conflict and the confusion among the lower courts on this issue. Petition at 1-2. The State even acknowledges that the Nevada Supreme Court has itself reached different conclusions on the issue of federal law presented here. BIO at 6 (citing *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) for the proposition "that the weighing requirement is part of a factual determination that must be found by a jury beyond a reasonable doubt in accordance with *Ring v. Arizona*, 536 U.S. 584 [ ] (2002)). The State's failure to address these arguments demonstrates both that this Court's review is necessary and that its argument that the issue here is purely a matter of state law is incorrect.

The State offers two reasons to deny certiorari: (1) this Court should decline Mr. Bejarano's invitation to abrogate *McKinney v. Arizona*[1] and overrule *Clemons v. Mississippi*[2] (BIO at 3-5); and (2) the Nevada Supreme Court's decision was based on an application of state law unaffected by *Hurst v. Florida*[3] (BIO 6-12). As explained below, the States reasons for denying certiorari are misdirected, and this Court should decide these important questions of federal law.

A. This Court Should Grant Certiorari To Apply *Andres* And *Wilbur* To Nevada's Capital Sentencing Scheme

In the Petition, Mr. Bejarano argued that taken together, *Andres v. United States*[4] and *Mullaney v. Wilbur*[5] established that the burden remains on the State to prove each element of a capital offense beyond a reasonable doubt and that the burden cannot be on the jury to qualify or undo a finding of death eligibility. Petition at 10, 23-27.

Mr. Bejarano argued that certiorari review was warranted on this issue in part because this Court's decision to grant certiorari in *Ramos v. Louisiana* demonstrated that this Court's Sixth Amendment jurisprudence remained unsettled. Petition at 3. This Court recently issued its decision in *Ramos*, which held that the Fourteenth Amendment fully incorporates the Sixth Amendment's

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[1] 140 S. Ct. 702 (2020).
[2] 494 U.S. 738 (1990).
[3] 136 S. Ct. 616 (2016).
[4] 333 U.S. 740 (1948).
[5] 421 U.S. 684 (1975).

guarantee of a unanimous jury verdict. *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Mr. Bejarano's case presents this Court with an additional opportunity to consolidate and clarify its Sixth Amendment jurisprudence by making clear that the burden cannot be on the jury to qualify or undo a finding of death eligibility.

The State argues that Mr. Bejarano did not give the Nevada Supreme Court the opportunity to consider the implication of *Andres* and *Mullaney* together. BIO at 4. The State is incorrect. Mr. Bejarano raised this argument in the petition for rehearing before the Nevada Supreme Court. *See* Petitioner's Supplemental Appendix (Pet. Supp. App.). The petition for rehearing was the first opportunity Mr. Bejarano had to challenge the Nevada Supreme Court's rewriting of the state's death penalty statute in *Castillo v. State,* 442 P.3d 558 (Nev. 2019). *See* Pet. Supp. App. at 26-29.[6] Mr. Bejarano's constitutional claim has therefore been presented to the state courts for review and is now ripe for a decision by this Court.

B. Nevada's Unique Three-Step Capital Sentencing Scheme Distinguishes This Case From *McKinney*

The State next argues that this Court should reject Mr. Bejarano's contention that *McKinney v. Arizona*, 140 S. Ct. 702 (2020) should be abrogated to the extent it concluded *Clemons* was still good law. BIO at 3-5. However, Mr. Bejarano is not asking this Court to abrogate *McKinney*. In *McKinney*, this Court concluded that *Clemons* remained good law in Arizona for a petitioner whose conviction was final

[6] Mr. Bejarano's opening brief was filed before the Nevada Supreme Court decided *Castillo*.

before *Ring v. Arizona*, 536 U.S. 584 (2002). *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.* at 706. 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 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.

The State argues that Nevada's three-step capital sentencing scheme is a "distinction" but without "a meaningful and necessary difference." BIO at 5; *see also* 6-8. The State is incorrect.

Nevada statutes establish a capital-sentencing scheme with two preliminary steps, which are required before the jury can consider whether to impose the death penalty. The jury must (1) find at least one statutory aggravating factor and (2) determine that no mitigating circumstances outweigh the aggravating factor or factors. *See* NRS 175.554, 200.030(4)(a). Only after the jurors complete these two preliminary steps can they move to the third step, where they for the first time can consider non-statutory aggravation and other-matter evidence relating to the victim and individual characteristics of the defendant. *See* NRS 175.552(3); *Burnside v. State*, 352 P.3d 627, 646 (Nev. 2015); *Butler v. State*, 102 P.3d 71, 82–83 (Nev. 2004).

Even the cases cited by the State acknowledge that the weighing of mitigation and aggravating circumstances is a prerequisite to the jury's consideration of the death penalty as a sentencing option. In *Lisle v. State*, 351 P.3d 725 (Nev. 2015), the Nevada Supreme Court characterized the outweighing determination as one of selection rather than eligibility, holding that outweighing 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.* at 732. But the Court further explained that, in saying that Nevada's outweighing process was part of the "selection phase," it was referring to the definition given that phrase by this Court in *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992), which was a case interpreting Louisiana's capital sentencing scheme, not the scheme enacted

by the Legislature. *Lisle*, 351 P.3d at 732–33.[7] And the Nevada Supreme Court continued to recognize, as it had previously, that the capital sentencing scheme includes "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." *Id.* at 732; *see also Burnside,* 352 P.3d at 646 (in decision issued same day as *Lisle*, continuing to recognize three-step sentencing scheme in Nevada). It does not matter what this weighing step is called. What matters is that it is an element of the offense that must be found by a jury before the jury can consider whether death is an appropriate sentencing option.

Thus, based upon the above, the State is incorrect that Nevada's three-step capital sentencing scheme is a "distinction" without a "difference," (BIO at 5), and this Court should grant certiorari and overrule *Clemons*.

C. The State's Remaining Reasons For Denying Certiorari Are Not Persuasive

The State next argues that *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not change the capital sentencing scheme in Nevada. BIO at 6-7. In support, the State relies upon *Kansas v. Carr*, 136 S. C. 633 (2016) (discussing Kansas death penalty statute) and *Sawyer v. Whitley*, 505 U.S. 333 (1992) (discussing Louisiana death penalty statute), to argue that this Court's jurisprudence supports Nevada's

[7] In *Sawyer v. Whitley*, as in *Lisle*, this Court addressed actual innocence of the death penalty. Neither case addressed the Sixth Amendment.

approach to death eligibility. BIO at 7-8. However, as explained above, neither of these cases involve Nevada's "relatively unique" capital-sentencing scheme. *Lisle*, 351 P.3d at 732. *Hurst* applies in states with this three-step system in a different way than in other states; because outweighing is a prerequisite to consideration of the death penalty, it is an "element" under *Apprendi* that must be submitted to a jury under the standard of beyond a reasonable doubt.

Finally, the State argues that because *Hurst* did not create a new, previously unavailable legal claim, the Nevada Supreme Court's application of state statutory procedural bars was proper (BIO at 11-12). As explained in the Petition, although the Nevada Supreme Court denied Petitioners claim on the basis of procedural default, those procedural bars were intertwined with federal Sixth Amendment law. *See* Petition at 9 n.3. Because the Nevada Supreme Court's decision turned on the resolution of a federal question, the default ruling was not independent of federal law. *See id.*; *Bejarano v. Filson*, 448 P.3d 551 (Nev. 2019) (table), citing *Castillo*, 442 P.3d 558 (holding that Castillo failed to overcome procedural bars "[b]ecause Castillo's arguments regarding *Hurst* lack merit"). The State fails to respond to these points, which should be deemed a concession that this Court's review is not precluded here. *See* U.S. Sup. Ct. R. 15. 2 ("Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.").

CONCLUSION

The State does not meaningfully address or rebut Mr. Bejarano's arguments that this Court's review is warranted. 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 judgment should be reversed.

DATED this 4th day of June, 2020.

Respectfully submitted,
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SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * *

JOHN BEJARANO,

Petitioner/Appellant,

vs.

WILLIAM GITTERE, et al.,[1]

Respondent/Appellee.

Supreme Court No. 76629

District Court Case No. C87678

(Death Penalty Case)

PETITION FOR REHEARING

[1] Per NRAP 43(c)(1), William Gittere is substituted as Respondent.

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I. INTRODUCTION

On September 13, 2019, this Court affirmed the denial of John Bejarano's petition for writ of habeas corpus based on its recent pronouncements in *Castillo v. State*, 135 Nev. ___, 442 P.3d 558 (Nev. 2019), that (1) the weighing of aggravators against mitigation is not part of the death-eligibility determination under Nevada law, and (2) the holding of *Hurst v. Florida*, 136 S. Ct. 616 (2016), does not require a jury to find the mitigation insufficient to outweigh aggravating circumstances beyond a reasonable doubt. This Court's unforeseeable and retroactive judicial expansion of narrow and precise statutory language defining death-eligibility violates the fair-notice requirements of the Due Process Clause. In the alternative, this Court's holding in *Castillo* reveals an inherent vagueness in the statute that also violates federal due process principles and the Eighth Amendment. Finally, this Court's new interpretation of the capital sentencing scheme independently violates Mr. Bejarano's right to a jury trial by holding

that the outweighing finding walks back, rather than advances, him to death eligibility.

Mr. Bejarano therefore petitions this Court for rehearing on the grounds that this Court overlooked and misapprehended these material questions of law and failed to consider state statutes and prior decisions controlling the issues presented here. NRAP 40(c)(2)(B).

II. ARGUMENT

A. This Court's Decisions in *Castillo*, *Jeremias*, and *Lisle* Represent a Sharp Divergence from Nevada Statutes and its Own Precedent

The proper interpretation of Nevada's death-penalty scheme over the last four decades has been the subject of sharp disagreement by the members of this Court. *See Canape v. State*, 109 Nev. 864, 888, 859 P.2d 1023, 1038 (1993) (Springer, J., dissenting) ("I have become convinced that no one, including the members of this court, presently understands precisely what juries are required to do in Nevada when they are asked to decide between the death penalty and life imprisonment."). But capital defendants could at least rely on this Court's consistent enforcement of one aspect of the scheme—the

requirement that juries consider death as an option only *after* concluding that mitigating evidence does not outweigh any statutory aggravating factors. Thus, as this Court held repeatedly over three decades, a capital defendant is not "death eligible" unless the outweighing determination favored the State. Starting in 2015, however—and without explicitly acknowledging the departure—this Court began sharply diverging from the statutes and this Court's prior precedents. In addition to disregarding stare decisis without "compelling reasons for so doing," *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008); *see State v. Harte*, 124 Nev. 969, 977–78, 194 P.3d 1263, 1268 (2008) (Hardesty, J., concurring), this Court has usurped the power of the Nevada legislature by rewriting the plain language of the capital sentencing scheme. Reconsideration of this Court's decision is therefore required.

1. For more than three decades this Court's opinions were aligned with the plain language of the capital-sentencing scheme.

Nevada statutes establish a capital-sentencing scheme with two preliminary steps, which are required before the jury can consider

whether to impose the death penalty. The jury must (1) find at least one statutory aggravating factor and (2) determine that no mitigating circumstances outweigh the aggravating factor or factors. *See* NRS 175.554, 200.030(4)(a). Only after the jurors complete these two preliminary steps can they move to the third step, where they for the first time can consider non-statutory aggravation and other-matter evidence relating to the individual characteristics of the defendant. *See* NRS 175.552(3); *Burnside v. State*, 131 Nev. 371, 398, 352 P.3d 627, 646 (2015); *Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82–83 (2004). These statutes work together; indeed, it makes little sense to include a third step that merely duplicates the considerations, arguments, and evidence from the second step.

For thirty-five years, opinions from this Court followed the plain language of these statutes, consistently holding that the finding of an aggravating factor and the outweighing determination are *both* prerequisites to death eligibility. In 1984, this Court explained that "the death penalty may be imposed" only if mitigating factors do not outweigh aggravating factors. *Ybarra v. State*, 100 Nev. 167, 176, 679

P.2d 797, 802 (1984); *see also Gallego v. State*, 101 Nev. 782, 790, 711 P.2d 856, 862 (1985). In two cases the following decade, this Court held that the death penalty "is only a sentencing option" if aggravating factors outweigh mitigating circumstances. *Bennett v. State*, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995); *see Williams v. State*, 113 Nev. 1008, 1024 n.8, 945 P.2d 438, 447 n.8 (1997).

Over the following twenty years, this Court continued to characterize the outweighing determination as an "eligibility" finding, required before consideration of the death penalty. *See McConnell v. State*, 121 Nev. 25, 33, 107 P.3d 1287, 1292 (2005); *see also Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011); *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001); *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); *Middleton v. State*, 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1998).

2. In 2015, this Court began departing from its precedents and the statutory sentencing scheme

In a series of three opinions over four years, *Lisle*, *Jeremias*, and, now, *Castillo*, this Court abandoned its precedents *sub silentio* and

departed from the plain language of the statutes, purportedly removing outweighing from the eligibility determination.

This Court began to change course in *Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). For the first time, this Court characterized the outweighing determination in Nevada as one of selection rather than eligibility, holding that outweighing 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.* at 732. But this Court further explained that, in saying that Nevada's outweighing process was part of the "selection phase," it was referring to the definition given that phrase by the Supreme Court in *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992), which was a case interpreting Louisiana's capital sentencing scheme, not the scheme enacted by the Legislature. *Lisle*, 131 Nev. at 366, 351 P.3d at 732–33.[2] And this Court continued to recognize, as it had for the previous thirty years, that "death-eligibility" in Nevada refers to *both* preliminary

[2] In *Sawyer v. Whitley*, as in *Lisle*, the United States Supreme Court addressed actual innocence of the death penalty. Neither case addressed the Sixth Amendment.

determinations—which, this Court explained, "stems from 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." *Id.* at 732; *see also Burnside,* 131 Nev. at 398, 352 P.3d at 646 (in decision issued same day as *Lisle*, continuing to recognize three-step sentencing scheme in Nevada). Nevertheless, this holding provoked a strong dissent from Justices Cherry and Saitta, 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." *Lisle*, 131 Nev. at 370, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting). The dissenting opinion, unlike the majority, recognizes the key difference between Nevada's statutory sentencing scheme and the scheme at issue in *Sawyer*: The plain language of Nevada's scheme requires outweighing as a precondition to reaching the ultimate sentencing decision. *Id.* Ignoring this difference, the dissent concludes, transforms Nevada's scheme into something different than the statutes require. *Id.*

In *Jeremias v. State*, this Court doubled down on its statement from *Lisle*, purportedly removing outweighing completely from the eligibility determination. 134 Nev. ___, 412 P.3d 43, 54, *reh'g denied* (Apr. 27, 2018), *cert. denied*, 139 S. Ct. 415 (2018). "[A] defendant is death-eligible," this Court newly held, "so long as the jury finds the elements of first-degree murder and the existence of one or more aggravating circumstances." *Id.* But this Court still qualified its holding, adding that its use of "death-eligibility" came from Eighth Amendment narrowing case law, not Sixth Amendment case law. *See id.* (explaining that the use of "death-eligible" is "as the term is used for the purposes of the narrowing requirement amenable to the beyond-a-reasonable-doubt standard").

Finally, in *Castillo*, this Court completed what it started in *Lisle* and *Jeremias*, reading the outweighing step out of existence. This Court insisted that "the weighing of aggravating and mitigating circumstances is not part of death-eligibility under [Nevada's] statutory scheme." *Castillo v. State*, 442 P.3d at 561. In support, this Court cited only to *Jeremias* and *Lisle*—ignoring this Court's previous cases holding

the exact opposite. *Id.* And, unlike *Jeremias* and *Lisle*, this Court did not qualify its use of the term "death-eligible" to refer to the definition of the term from Eighth Amendment cases.

Thus, in the past four years, this Court has disrupted decades of precedent in a way that fundamentally misinterprets what Nevada juries are supposed to do when undertaking one of the most crucial and grave determinations any jury could make. And this disruption was completely unnecessary, done not to rectify confusion in the statutes but to reject constitutional claims that could have been resolved without rejiggering the capital sentencing scheme. *See Lisle*, 131 Nev. at 369, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting); *see also Castillo*, 442 P.3d at 561 n.1 (noting "apparent confusion" caused by recent changes in this Court's precedent).[3]

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[3] This Court rejected "Castillo's argument that he should be permitted to take advantage of the apparent confusion caused by our lack of precision when using the term 'eligibility.'" *Castillo*, 442 P.3d at 561 n.1. But this just shows why this Court should not be reinterpreting the capital sentencing scheme when this case concerns the application of the Sixth Amendment.

In *Lisle*, the parties did not have an opportunity to brief the issues above. And interpretation of the capital sentencing scheme was not necessary there—or in *Jeremias* or *Castillo*. It is for this very reason

B. This Court's Unforeseeable Expansion of Narrow and Precise Statutory Language Defining Death Eligibility Cannot Be Applied Retroactively to Cases on Collateral Review

Prior to this Court's decision in *Lisle v. State*, 351 P.3d 725, 131 Nev. 356 (2015), there was no question that the weighing of aggravators against mitigation was part of the death-eligibility determination under Nevada law. The plain language of the statute said that it was. *See* NRS 175.554, 200.030(4)(a). And this Court said that it was. *See Ybarra,* 100 Nev. at 176, 679 P.2d at 802. Repeatedly. *See McConnell,* 121 Nev. at 33, 107 P.3d at 1292; *Servin*, 117 Nev. at 786, 32 P.3d at 1285; *Hollaway*, 116 Nev. at 745, 6 P.3d at 996; *Middleton*, 114 Nev. at 1116–17, 968 P.2d at 314–15; *Williams*, 113 Nev. at 1024 n.8, 945 P.2d at 447 n.8; *Bennett*, 111 Nev. at 1110, 901 P.2d at 683.

Most unequivocally, this Court held in 2002 that

> Nevada statutory law requires two distinct findings to render a defendant death-eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that

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that this Court should not have been engaging in radical reconstruction of the statutory scheme in cases where it was unnecessary to do so.

> there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing.

Johnson v. State, 59 P.3d 450, 460, 118 Nev. 787, 802 (2002), (quoting NRS 175.554(3)) *overruled by Nunnery v. State*, 127 Nev. 749, 770-78, 263 P.3d 235, 250-55 (2011).

The holdings in *Lisle*, *Jeremias*, and *Castillo*, were unexpected and indefensible in light of prior precedent in violation of state and federal due process principles. As the dissent in *Lisle* pointed out, this Court had "for decades unequivocally and consistently" "characterized the weighing determination as one of two findings required to make a defendant 'death-eligible' in Nevada." *Lisle*, 351 P.3d at 731, 131 Nev. at 363 (Cherry & Saitta, JJ., dissenting). There can be no question that when this Court affirmed Mr. Bejarano's conviction in 1988, this Court's precedents unequivocally held that the weighing process was part of the eligibility determination in Nevada.

Yet in its 2019 Order of Affirmance, this Court retroactively applied its new and unforeseeable re-interpretation of the law to Mr. Bejarano. In so doing, the Court overlooked or misapprehended controlling United State's Supreme Court precedent. The High Court in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) held that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." This is so because "[w]hen [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* The Court reiterated in *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) that "[d]ue process prohibits the retroactive application of judicial interpretations of criminal statutes that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'"

This Court's newly minted interpretation of Nevada law in *Lisle* satisfies this standard as it "was clearly at odds with the statute's plain language and had no support in prior [Nevada] decisions." *Rogers*, 532 U.S. at 458. As the dissent acknowledged in *Lisle*, this Court "engage[d] in semantic gymnastics in order to conclude that Nevada's death penalty scheme is something other than what the statutes plainly make it." 131 Nev. at 370, 351 P.3d at 735. The error committed by the Court here falls under *Bouie* rather than *Rogers* because the rule derives from a statute passed by the Legislature rather than a common law doctrine that can be refined by judicial interpretation. *Cf. Metrich v. Lancaster*, 569 U.S. 351, 365 (2013) (state supreme court "did not violate due process" when it interpreted "an unambiguous statute" "for the first time") (quotations omitted).

Just as the change in law announced by the South Carolina Supreme Court in *Bouie* could not be applied retroactively, neither can this Court's change in the law announced in *Lisle* be applied retroactively to cases that became final prior to 2015. Petitioners like Mr. Bejarano did not have fair notice at the time of their convictions

that the finding of an aggravator alone was sufficient to make them eligible for the death penalty. *See, e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.") (internal citations omitted); *Marks v. United States*, 430 U.S. 188, 191-192 (1977) (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam) (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

The Eleventh Circuit in *Magwood v. Warden, Alabama Dept. of Corrections*, 664 F.3d 1340, 1348-49 (11th Cir. 2011), held that an

unforeseeable and retroactive judicial expansion of precise statutory language in Alabama's death-penalty statutes which altered the standards for death eligibility violated federal due process under *Bouie* and *Rogers*. Similarly here, this Court's expansion in *Lisle* of the definition of precise statutory language defining death eligibility violates the fair-warning requirement of the Due Process Clause. Accordingly, this Court cannot apply its re-interpretation of death eligibility under Nevada law to defendants like Mr. Bejarano whose convictions became final prior to 2015.

Instead, this Court must apply the law as it existed at the time Mr. Bejarano's conviction became final. Clearly, in 1989 when his conviction became final, the weighing process was part of the death eligibility determination. And applying the decision in *Hurst* to Nevada law as it existed in 1989, Mr. Bejarano is entitled to relief.

C. This Court's Unforeseeable Expansion of the Narrow and Precise Statutory Language Defining Death Eligibility has Rendered the Statute Unconstitutionally Vague

As discussed above, until recently, the law governing the weighing of aggravating and mitigating circumstances has been clear, at least

with respect to the role of the outweighing finding in the capital sentencing scheme. This Court's departure from that law has created two vagueness problems that render the statute unconstitutional.

First, the Eighth Amendment prohibits the use of "vague propositional factor[s]" in the sentencing decision. *See Tuilaepa v. California*, 512 U.S. 967 (1994). The reason is that the Supreme Court's entire death penalty jurisprudence is aimed at ending "arbitrary and capricious sentencing." *See id.* A vagueness challenge under the Eighth Amendment asserts that "the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leave them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard v. Cartwright*, 486 U.S. 356, 361–62 (1988) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

NRS 175.554 is without ambiguity: "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." This

language requires two findings. *Johnson v. State*, 118 Nev. at 802, 59 P.3d at 460, is also without ambiguity: "This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and *we conclude that it is in part a factual determination, not merely discretionary weighing*." *Id.* (emphasis added). This language also makes clear two findings are required.

Against this is this Court's recent decision in *Castillo*, which held that "the weighing of aggravating and mitigating circumstances is not part of death-eligibility under our statutory scheme." *Castillo*, 442 P.3d at 561. This directly contradicts the statute and this Court's prior case law.

Taking *Castillo* as law, the statutory scheme must be vague because this Court has taken two opposite positions on its meaning. And these two opposite readings of death eligibility must also mean that the jury in Mr. Bejarano's case were not adequately informed on what they needed to find in order to impose the death penalty. This Court's rulings show that some jurors likely interpreted weighing as an eligibility finding and other may have interpreted it as a selection

finding. If this Court can interpret the statutory scheme one way for thirty years and then interpret it entirely differently it must follow that lay jurors would experience the same problem.

This distinction matters. Under *Hollaway v. State*, 116 Nev. 732, 6 P.3d 987 (2000), this Court held that "other matter" evidence could be considered as part of sentence selection, but not for eligibility. *Id.* at 746, 6 P.3d at 997; *see also* NRS 175.552(3). However, the language in *Castillo*, now, calls the jury instructions this Court has carefully crafted over the years into doubt: "Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed . . . ." *Castillo*, 442 P.3d at 561 (internal citations omitted). If, as the *Castillo* opinion indicates, weighing is no longer part of the eligibility determination, weighing is also no longer part of the narrowing function. *See Hollaway*, 116 Nev. at 745, 6 P.3d at 996. This, in turn, calls into question this Court's conclusion that "other matter" evidence may not be considered as part

of the weighing process. *Id.* ("Under Nevada's statutory sentencing scheme, the State can offer this evidence for only one purpose: for jurors to consider in deciding on an appropriate sentence after they have determined whether the defendant is or is not eligible for death.").

The conflict between *Hollaway* and *Castillo* shows the vagueness now present in Nevada's death penalty scheme. This lack of clarity invites jurors to do that which *Furman*—and the Nevada Legislature—sought to prevent: impose death arbitrarily. *See Hollaway*, 116 Nev. at 745, 6 P.3d at 996 (describing how "Nevada Legislature passed and the Governor approved Senate Bill No. 220" to "implement [the] narrowing function" required by Constitution). Because this Court's reading of NRS 175.554 does not channel the arbitrary and capricious imposition of death, the statute is unconstitutionally vague under the Eighth Amendment.

Second, the Fourteenth Amendment forbids statutes that fail to convey what they prohibit. "As generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The requirement for clarity is enhanced in criminal statutes. *See United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009). Though the language of NRS 175.554, and this Court's prior precedent, has been clear, this Court's deviation from that language has created irreconcilable vagueness. Indeed, this Court's apparent propensity to disagree with itself about this language can only reflect a vagueness in the statute. For, if this Court cannot agree with its prior interpretation, an ordinary person cannot be expected to know how a capital defendant becomes death eligible. Because the statute is now vague under the Fourteenth Amendment's due process clause, this Court must declare it unconstitutional and set aside Mr. Bejarano's death sentence.

D. This Court's Reinterpretation of the Capital Sentencing Scheme Violates Petitioner's Right to a Jury Trial as Jurors Make Findings. They Do Not "Walk Back" Findings.

In an attempt to avoid the above conflict with the *Apprendi* line of cases, this Court reformulated Nevada's capital-sentencing scheme by

reversing the legal effect of the outweighing finding. This new formulation requires the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, to 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 second line of High Court precedent applying the Sixth Amendment and demands reconsideration.

The High Court first considered in *Andres v. United States* the interpretation of a statute that required jurors 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.* The 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, the Court explained, the jury must decide

unanimously on guilt and then decide unanimously between life imprisonment and death. *Id.*

Next, in *Mullaney v. Wilbur*, the High Court considered a Maryland statute that required a defendant 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. 421 U.S. 684, 684–85 (1975). The 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 the Court concluded that both aspects of the Maryland statute violated due process. *Id.* "This is an intolerable result," the 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.

The 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 death-penalty statutes given by this Court violates Mr. Bejarano's constitutional right to 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 lessen a death sentence to life imprisonment. *See*

Mullaney, 421 U.S. at 703–04.[4] Thus, this Court should reconsider its erroneous holding that Nevada defendants become death-eligible at the first stage in the sentencing determination, then can become non-death-eligible at the second stage.

III. CONCLUSION

For the foregoing reasons, Mr. Bejarano requests that this Court grant his petition for rehearing and vacate his death sentence.

DATED this 1st day of October, 2019.

Respectfully submitted
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[4] Allowing the jurors, as an act of mercy, to walk back a death sentence to life imprisonment also lessens their sense of personal responsibility, in violation of the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the spacing and formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

   It has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 font Century.

2. I further certify that this petition for rehearing complies with the type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,401 words.

   DATED this 1st day of October, 2019.

Respectfully submitted
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1st day of October, 2019, electronic service of the foregoing **PETITION FOR REHEARING** shall be made in accordance with the Master Service List as follows:

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