

No. \_\_\_\_\_

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OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT LEE MCCONELL, Petitioner,

v.

WILLIAM GITTERE, Warden, et al., Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

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## QUESTION PRESENTED

(Capital Case)

Nevada's capital sentencing scheme requires a jury to make two separate eligibility findings before it can consider the death penalty as a sentencing option. First, the jury is required to find the existence of at least one statutory aggravating circumstance. Second, it must determine whether any aggravating circumstances found to exist are outweighed by any mitigating circumstances. Only after these findings are made can the jury move to the third step of Nevada's sentencing scheme and consider other aspects of the defendant's character and record to determine whether death is the appropriate punishment.

The Nevada Supreme Court has concluded that a jury need not make the second eligibility finding, i.e., the outweighing determination, beyond a reasonable doubt. This presents the following question for this Court's review:

Whether the Constitution requires—in a state in which a jury is required to find that mitigating circumstances do not outweigh the aggravating circumstances before considering the death penalty—that this finding be made by a jury beyond a reasonable doubt?

## **LIST OF PARTIES**

Petitioner Robert McConnell 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 the Ely State Prison.

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## **PETITION FOR WRIT OF CERTIORARI**

Robert McConnell respectfully petitions this Court for a writ of certiorari to review the judgment of the Nevada Supreme Court.

### **OPINIONS BELOW**

The decision of the Nevada Supreme Court, affirming the denial of Mr. McConnell's second state post-conviction petition for writ of habeas corpus, is unpublished and is found at App. 001-010. The Nevada Supreme Court's order denying the petition for rehearing is unreported and appears at App. 011-012. The Nevada Supreme Court's 2004 opinion affirming the judgment of conviction is reported at *McConnell v. State*, 102 P.3d 606 (Nev. 2004). App. 013-035.

### **JURISDICTION**

The Nevada Supreme Court's order of affirmance was issued on September 21, 2018, and a timely petition for rehearing was denied on December 21, 2018. On March 14, 2019, Justice Kagan extended the time to file a petition for writ of certiorari until and including May 20, 2019. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL 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 Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Nevada Revised Statutes § 175.554 provides in, pertinent part:

2. The jury shall determine:

- (a) Whether an aggravating circumstance or circumstances are found to exist;
- (b) Whether a mitigating circumstance or circumstances are found to exist; and
- (c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.

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

Nevada Revised Statutes § 200.030 provides in, pertinent part:

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

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

## **STATEMENT OF THE CASE**

On May 30, 2003, Robert McConnell waived counsel and entered a plea of guilty to sexual assault, first-degree kidnapping, and first-degree murder. Mr. McConnell, representing himself, continued to the penalty phase. After three days, the penalty phase concluded with the jury finding three statutory aggravating circumstances. App. 036. The jury also found that any mitigating circumstances found did not outweigh the aggravating circumstances. On August 28, 2003, the jury rendered a verdict sentencing Mr. McConnell to death. App. 039.

### **A. Facts of the Case**

In 2000, Mr. McConnell began dating April Robinson. Their relationship was tumultuous from the beginning and only got worse as time went on. They ended their relationship about a year later. A few months after their breakup, Robinson became engaged to Brian Pierce. The engagement was difficult to accept for Mr. McConnell. On August 7, 2002, Robinson, who was living with Pierce at the time, found Mr. McConnell standing in her home. Robinson testified that Mr. McConnell forced her into the bedroom and sexually assaulted her.

Following the assault, Robinson testified that Mr. McConnell forced her to drive him to California. While they were at a gas station, Robinson ran away to a hospital and contacted the police. The next morning, police officers found Pierce's body at the home he shared with Robinson. He had been stabbed and shot several times.

Mr. McConnell was arrested and charged with sexual assault, first-degree kidnapping, and first-degree murder.

At the conclusion of the penalty phase, the trial court instructed the jury that it could impose a sentence of death only if (1) the jury unanimously found at least one aggravating circumstance had been established beyond a reasonable doubt and (2) the jury unanimously found that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances. App. 042-070. The court, however, did not instruct the jury that the State shouldered the burden of proving beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances.

#### **B. Nevada's Capital Sentencing Scheme**

Nevada law provides that a defendant cannot be eligible for 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.”); *Hollaway v. State*, 6 P.3d 987, 996 (Nev. 2000) (“Under Nevada’s capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the

mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating.”); *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”).

After a jury finds a defendant death eligible, it “must then decide on a sentence unanimously and still has discretion to impose a sentence less than death.” *Hollaway*, 6 P.3d at 996. Although the Nevada Supreme Court has repeatedly held that the weighing determination is a condition precedent to consideration of the death penalty, it has also concluded that the weighing determination is not subject to proof beyond a reasonable doubt. *See Nunnery v. State*, 263 P.3d 235, 250–51 (Nev. 2011); *McConnell v. State*, 212 P.3d 307, 314–15 (Nev. 2009), as corrected (July 24, 2009). These conflicting positions are in contravention of federal law.

## REASONS FOR GRANTING THE PETITION

### A. The Nevada Supreme Court’s Conclusion that the Outweighing Element is not Subject to Proof Beyond a Reasonable Doubt Conflicts with this Court’s Precedents.

A long line of cases from this Court has established that any fact increasing a defendant’s statutory-maximum sentence must be proved to the jury by the State beyond a reasonable doubt. First, in *In re Winship*, 397 U.S. 358, 364 (1970), this Court held “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Proof beyond a reasonable doubt is necessary, the Court reasoned, in order to ensure accuracy in criminal judgments. *Id.* at 361–64.

After *Winship*, this Court expanded the definition of an “element” subject to proof beyond a reasonable doubt and the associated right to a jury trial. *Winship* defined the elements of a criminal offense as “every fact necessary to constitute the crime” under state law. 397 U.S. at 364. Over the next few decades, this Court began treating facts affecting a defendant’s maximum sentence for a crime as “elements” that have to be submitted to a jury and proven beyond a reasonable doubt. *See McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (recognizing that “in certain limited circumstances *Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged”); *Mullaney v. Wilbur*, 421 U.S. 684, 698–99 (1975) (rejecting state’s “formalis[tic]” argument and

concluding that *Winship* cannot be “limited to those facts that constitute a crime as defined by state law”).

In *Apprendi v. New Jersey*, 530 U.S. 466, 468–69 (2000), this Court clarified the expansion of *Winship*. The Court considered the constitutionality of a New Jersey statute that allowed a judge to increase a sentence above the statutory maximum after finding by a preponderance of the evidence that the defendant committed the crime with a biased purpose. *Id.* This Court concluded that, because the finding of a biased purpose increased the penalty beyond the statutory maximum, it was “the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” *Id.* at 494 n.19. As a result, this Court reasoned, it needed to be “submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. This Court further noted that it was immaterial whether the state referred to the finding as an “element” or a “sentencing factor” and explained 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?” *Id.* at 494.

Two years later, in *Ring v. Arizona*, 536 U.S. 584, 592 (2002), this Court applied the *Apprendi* principles to Arizona’s capital-sentencing scheme. Specifically, this Court concluded that the existence of an aggravating circumstance in Arizona was the “functional equivalent of an element of a greater offense” because it increased the “punishment beyond the maximum authorized by a guilty verdict

standing alone.” *Id.* at 605, 609 (quotations omitted). Thus, the existence of an aggravating circumstance had to be found by a jury. *Id.* at 609.

More recently, this Court reaffirmed that *any* finding required in the eligibility phase of a capital case is an element and therefore must be submitted to the jury—and “each element of a crime [needs to] be proved to a jury beyond a reasonable doubt.” *Hurst v. Florida*, 136 S. Ct. 616, 619—621 (2016).

Nevada considers the weighing of aggravation against mitigation a *finding* that must be made *before* the jury is able to make the final, moral decision of whether to impose death or a lesser sentence. *See, e.g., Lisle*, 351 P.3d at 732. As such, this necessary finding is the functional equivalent of an element of a greater offense, triggering the protections of *Ring* and *Apprendi*. The Nevada Supreme Court’s decisions to the contrary fail to do justice to the requirements of federal law.

In *Nunnery*, the Nevada Supreme Court determined “that even if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof.” 263 P.3d at 250. *Hurst* shows that this position can no longer survive.

The Nevada Supreme Court recently considered the interplay between *Nunnery* and *Hurst* in *Jeremias v. State*, 412 P.3d 43, 53, *reh’g denied* (Nev. 2018), *cert. denied*, 139 S. Ct. 415 (2018), and incorrectly concluded that *Nunnery* survived *Hurst*.

In *Jeremias*, the appellant argued that *Hurst* overruled *Nunnery* because it required every factual finding required for death eligibility, including weighing, to be proven to a jury beyond a reasonable doubt. *Id.* at 53–54. The Nevada Supreme Court disagreed, reasoning that under *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), the weighing determination presented “a moral question which could not be reduced to a cold, hard factual determination” and thus similar language in *Nunnery* remained good law.<sup>1</sup> *Id.* But *Carr* was an Eighth Amendment case, and *Jeremias* was wrong to rely on it to justify continued adherence to *Nunnery*.

*Carr* is inapposite because it considered an Eighth Amendment challenge to a jury instruction that failed to inform jurors that mitigating circumstances did not need to be proven beyond a reasonable doubt. *Id.* at 642–44. In *Jeremias*, the Nevada Supreme Court failed to grasp the distinction that the challenge to the weighing instruction was brought under the Sixth Amendment and the teachings of *Hurst*, *Ring*, and *Apprendi*. Moreover, *Carr*’s dicta—that it may not be possible to apply a standard of proof to a selection-phase weighing determination—ignores what Kansas’s own statutes require: an outweighing determination that must be proved beyond a reasonable doubt by the State. *See State v. Robinson*, 363 P.3d 875, 1079-80 (Kan. 2015) (“The Kansas death sentencing scheme requires that the jury

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<sup>1</sup> In denying Mr. McConnell’s claim, the Nevada Supreme Court relied on its incorrect reading of *Hurst* to conclude that good cause had not been established to overcome the state procedural default bars. App. 002-003. The court “did not invoke any state-law grounds independent of the merits of [the petitioner’s] federal constitutional challenge.” *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.5 (2017) (quotations omitted). Accordingly, this Court has jurisdiction to decide the legal issue in this case.

make two findings beyond a reasonable doubt in arriving at a death sentence . . . . ‘the existence of such aggravating circumstance is not outweighed by any mitigating circumstances found to exist.”) *overruled on other grounds by State v. Cheever*, 402 P.3d 1126 (Kan. 2017); *see also Carr*, 136 S. Ct. at 642 (prefacing dicta by recognizing that Court was approaching issue “in the abstract, and without reference to our capital-sentencing case law”).

In support of its ruling in *Jeremias*, the Nevada Supreme Court stated the weighing determination in Nevada is a “moral question which could not be reduced to a cold, hard factual determination.” 412 P.3d at 54. However, this Court’s decisions in *Apprendi*, *Ring*, and *Hurst*, do not limit themselves only to determinations that lack a moral component. Thus, the weighing of mitigation against aggravation, like the finding of aggravating circumstances in *Ring*, is the “functional equivalent” of an element increasing the maximum penalty, requiring it be found by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609.

**B. Lower Courts Are Divided as to Whether the Outweighing Element is Subject to Proof Beyond a Reasonable Doubt.**

One of the considerations governing this Court’s decision to grant a petition for a writ of certiorari is whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.” U.S. Sup. Ct. R. 10(b). That conflict clearly exists here and provides a compelling reason to grant Mr. McConnell’s petition for writ of certiorari.

Even in light of *Hurst*, there is still considerable confusion as to whether the weighing determination—even when it is clearly a prerequisite to a defendant’s death eligibility—requires a jury to make that finding under a reasonable doubt standard. This case presents a vehicle to eliminate that confusion.

For states where the critical weighing finding was left in the hands of judges, rather than juries, at least two states invalidated their capital sentencing schemes after *Hurst*. On remand, the Supreme Court of Florida interpreted this Court’s decision as “requir[ing] that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously be the jury.”

*Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

These findings include “the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.” *Id.* Similarly, the Delaware Supreme Court struck down its own death penalty statute as inconsistent with the Sixth Amendment. *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016) (en banc). The court concluded that the Sixth Amendment requires a jury to unanimously find that aggravating circumstances outweigh mitigating circumstances “beyond a reasonable doubt.” *Id.*

But three other courts, including the Nevada Supreme Court, have wrongly interpreted *Hurst* as excluding the weighing finding from those that must be found by the jury beyond a reasonable doubt. *See Ex Parte Bohannon*, 222 So. 3d 525, 529-30 (Ala. 2016) (adopting Eleventh Circuit’s pre-*Ring* approach that “relative ‘weight’

of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof,” and therefore, it is a determination that can be made by judges) (quoting *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983)). *See also State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (concluding *Hurst* did not require a jury to find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances).

Notably, many states recognized, before *Hurst*, that a jury must make the outweighing finding beyond a reasonable doubt. *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 death sentence is predicated, including that “(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved” (citations and internal quotation marks omitted)); *Willett v. State*, 983 S.W.2d 409 (Ark. 1998) (“If one juror determines that the aggravating circumstances do not exceed the mitigating circumstances beyond a reasonable doubt, the death sentence cannot be imposed.”). Even the Nevada Supreme Court initially appeared to find, post *Ring*, that the outweighing finding must be proven by the State and found by the jury beyond a reasonable doubt. *See Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), *overruled by Nunnery*, 263 P.3d at 250–51.

In fact, out of the ten states that consider the outweighing element a prerequisite before the jury can consider the death penalty, most—Arkansas, Colorado, Florida, North Carolina, Tennessee, Utah—require that finding to be

proven beyond a reasonable doubt.<sup>2</sup> Nevada, Mississippi, Missouri, and Oklahoma are the other states with this “relatively unique” aspect of capital sentencing schemes that do not require the outweighing element to be found beyond a reasonable doubt.<sup>3</sup>

Guidance is needed to eliminate confusion amongst the state courts. The Sixth Amendment requires that the weighing determination be treated a factual determination and an element of an offense, and thus, must be found “beyond a reasonable doubt” before the jury can consider the death penalty as a sentencing option. The beyond a reasonable doubt standard’s connection to the Sixth Amendment right to a jury trial is long established. Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10-11 (1989). Indeed, legal commentators believe the reasonable doubt standard encompasses the complex moral judgment of whether the death penalty is the appropriate sentence: the final step in Nevada’s capital sentencing scheme after an accused is deemed eligible for the ultimate punishment. See Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 268 (2017) (arguing all determinations necessary for the imposition of the death penalty should be found beyond a reasonable doubt).

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<sup>2</sup> See Ark. Code Ann. § 5-4-603; *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990); Death Penalty—Instructions to Jury at Separate Sentencing Proceeding. G.S. 15A-2000. (Adopted June 2016), NC Pattern Jury Inst.—Crim. 150.10; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-3-207.

<sup>3</sup> See Nev. Rev. Stat. Ann. § 175.554; Miss. Code. Ann. § 99-19-101; Mo. Ann. Stat. § 565.030; Okla. Stat. Ann. tit. 21, § 701.11.

In states like Nevada, jurors make all eligibility determinations *and* the ultimate moral decision of whether an accused should live or die. The “weighing component” during the eligibility stage is a critical finding that is necessary to be found before the jury is allowed to select the appropriate sentence. This case presents this Court with the ideal vehicle to hold that it is a finding that needs to be proven to a jury beyond a reasonable doubt.

## CONCLUSION

For the foregoing reasons, Mr. McConnell respectfully requests the Court grant his petition for writ of certiorari and vacate the judgment of the Nevada Supreme Court.

DATED this 16th day of May, 2019.

Respectfully submitted,

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