No. 18-9349

IN THE SUPREME COURT OF THE UNITED STATES

June 19, 2019

ROBERT LEE MCCONNELL, *Petitioner,*

v.

WILLIAM GITTERE, Warden, *Respondent.*

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

RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

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QUESTION PRESENTED

CAPITAL CASE

In Nevada, death eligibility attaches once the prosecution proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance. *Lisle v. State*, 131 Nev. 356, 365-366, 351 P.3d 725, 732 (2015); *Castillo v. State*, 135 Nev. Adv. Op. 16, __P.3d __ (2019). Death eligibility does not depend on a jury finding beyond a reasonable doubt that mitigating circumstances do not outweigh aggravating circumstances, and no such requirement exists in Nevada. *Id.*

In Nevada, a habeas petitioner must file a post-conviction petition for a writ of habeas corpus within one year after entry of the judgment of conviction, or one year after the Supreme Court issues its remittitur, if an appeal is taken. NRS 34.726(1). An untimely or successive petition is procedurally barred and must be dismissed absent a demonstration of good cause for the delay and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). When a claim was not previously legally available to a petitioner, it may constitute good cause to excuse the procedural bar. *Rippo v. State*, 134 Nev. Adv. Op. 53, 423 P.3d 1084, 1095 (2018). McConnell filed his second petition for writ of habeas corpus more than five years after remittitur issued from his direct appeal. App., p.2.

Did the Nevada Supreme Court err in finding that the decision in *Hurst v. Florida,* 577 U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) did not establish new

law applicable to Nevada's capital sentencing scheme, and therefore, did not support good cause to excuse statutory procedural bars applicable to McConnell's successive, untimely, and abusive petition for writ of habeas corpus?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Prior to the latest petition for writ of habeas corpus, McConnell's case has been the subject of extensive appellate and post-conviction litigation. His direct appeal was denied by the Nevada Supreme Court in 2004. *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied* at 121 Nev. 24, 107 P.3d 1287. Next, his first post-conviction petition for writ of habeas corpus was denied. *McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009). Then, five years after his direct appeal became final, and just shy of one year following the remittitur from his first post-conviction habeas appeal, current counsel filed a second petition for writ of habeas corpus.

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The Nevada Supreme Court rejected McConnell's claim that this Court's decision in *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616 (2016) established good cause to excuse procedural bars preventing McConnell from re-raising his untimely, successive, and abusive claim that the jury should have been required to find that the aggravating facts outweighed any mitigating factors beyond a reasonable doubt:

> Appellant argues that he has good cause to relitigate a jury instruction issue he previously raided, relying on the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616 (2016). We recently rejected appellant's interpretation of *Hurst*. *See Jeremias v. State*, 134 Nev. Adv. Op. 8, 412 P.3d 43, 53 (2018).
>
> Petitioner's Appendix, p.9, fn. 5.

McConnell's current petition for writ of certiorari seeks relief from the Nevada Supreme Court's order affirming the district court's denial of his second, untimely, abusive and successive post-conviction habeas corpus petition.

A. <u>Facts of the Case</u>

McConnell was once romantically involved with April Robinson. Eventually, she broke it off because she was afraid of him. *McConnell v. State*, 120 Nev. 1043, 1050, 102 P.3d 606, 612 (2004). She subsequently became close to Brian Pierce and they became engaged. *Id*. After the dissolution of his relationship with Robinson, McConnell told another girlfriend that he was going to murder Pierce. *Id*. McConnell began staking out their home, keeping notes of the comings and goings, and plotting his crimes. *Id*. at 1051, 612.

On August 7, 2002, McConnell broke into the home shared by Robinson and Pierce. McConnell began searching it while waiting for Pierce to arrive home. He laid in wait for Pierce, and confronted Pierce inside the home. McConnell took the

victim's wallet at gunpoint, and then shot Pierce at least nine times at close range. *Id.*, 1051, 613; 1054, 615.

After shooting Pierce, McConnell checked for a pulse and looked in the victim's eyes because he wanted to "see him die." *Id.*, 1054, 615. McConnell then dragged Pierce's body into a spare bedroom where he used a knife to dig some of the bullets out of the body, because he was curious to see what a Black Talon bullet would look like after being inside a body. *Id.*, 1054, 614. He also took a large knife and plunged it into the torso of Pierce's corpse, and left a videotape of the movie "Fear" on the body, as a message to April Robinson. *Id.*, 1051, 613.

When April Robinson got home, she was confronted by McConnell. McConnell duct taped Robinson's eyes, legs, and arms. He cut her clothes and underwear off with a knife, and sexually assaulted her repeatedly. *Id.*, 1051, 612. McConnell then forced Robinson into her own vehicle; he lied to Robinson, telling her that Pierce was locked up somewhere in a Uhaul, and was being watched by other people. *Id.* Robinson was able to escape from McConnell at a California gas station. *Id.*

McConnell was eventually arrested in San Francisco. While awaiting trial, McConnell called the mother of Brian Pierce to inform her that her son had died a coward. *Id.,* 1052, 613**.** He also sent Robinson mail from jail, taunting her and suggesting she should kill herself. *Id.*, 1052, 613.

After McConnell pleaded guilty, the jury was instructed that the State alleged the existence of three aggravating factors: 1) that the murder was committed during the commission of a robbery; 2) that the murder was committed

during the commission of a burglary; 3) that the murder involved mutilation of the victim. Appendix, 50. It found the existence of all three aggravators. *McConnell v. State*, 120 Nev. 1043, 1054,102 P.3d 606, 616 (2004). The Nevada Supreme Court affirmed the death sentence. *Id*. at 1071, 626.

REASONS FOR DENYING THE PETITION

A. McConnell's Question Presented Is Predicated Upon A Misapprehension Of Nevada's Capital Sentencing Scheme.

McConnell posits his question presented for review as follows:

> 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.

Petition for Writ of Certiorari, p. i. (italics added)

Within the question presented lies a fundamental problem: McConnell assumes that in Nevada, death eligibility attaches only after a jury finds that the aggravating factors outweigh the mitigating factors. But Nevada's capital scheme does not require any finding that the aggravating factors outweigh the mitigating factors, so it naturally follows that there can be no requirement that this unrequired finding be subject to the quantum of proof for which McConnell.

At one time, Nevada Supreme Court decisions were inconsistent on this subject, but this issue has long been resolved against McConnell. *Compare McConnell v. State*, 125 Nev. 243, 254, 212 P.3d 307, 314–15 (2009)125 Nev. 243, 254, 212 P.3d 307, 314–15 (2009) ("[N]othing in the plain language of [the relevant statutory] provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating

circumstances in order to impose the death penalty;" *Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (noting 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, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)), *overruled by Nunnery v. State*, 127 Nev. 739, 263 P.3d 235 (2011). The Nevada Supreme Court has made clear that, "a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance." *Castillo v. Nevada*, __ P.3d__, 2, 135 Nev. Adv. Op. 16 (2019)(*citing Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732(2015); *Jeremias v. State*, 412 P.3d 43, 134 Nev. __ (2018).

Nevada's approach to death eligibility, and the absence of a weighing requirement, finds sound support in United States Supreme Court jurisprudence. In *Lisle v. State*, 131 Nev. Adv. Op. 39, 351 P.3d 725 (2015), the Nevada Supreme Court relied on precedent from the United States Supreme Court to declare that death eligibility rests on the jury's finding of at least one aggravator and nothing more. *Lisle*, 351 P.3d at 731-32 ("The Court has referred to the narrowing component of the capital sentencing process as the "eligibility" phase and the individualized-consideration component as the 'selection' phase.") (*citing Buchanan v. Angelone*, 522 U.S. 269, 275, 118 S. Ct. 757, 139 L.Ed.2d 702 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant.") (citation omitted)).

The *Lisle* Court noted that in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed. 269 (1992), the United States Supreme Court, after discussing the narrowing requirement and explaining that it was met under the Louisiana statute by the elements of the capital offense and the finding of at least one statutory aggravating factor, characterized that process as establishing "eligibility for the death penalty." *Id.* at 342.

The reasoning *Sawyer, supra*, was recently reaffirmed in *Kansas v. Carr*, __ U.S. __ , 136 S. Ct. 633, 642, 193 L. Ed. 535 (2016):

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the *Kansas* statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.
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> *Kansas v. Carr*, __ U.S. __, 136 S. Ct. 633, 642, 193 L. Ed. 2d. 535 (2016).

/ / /

B. The Nevada Supreme Court's Decision Is Based Upon State Law, And The Decision In *Hurst* Did Not Affect Application Of State Law.

This Court should decline review because the state court did not decide an important question of federal law in a way that conflicts with other state courts. At best, the question presented, although framed as a question of constitutional law, essentially asserts that the state court misapplied state law in finding that McConnell was not entitled to relief. Rule 10. McConnell is urging this Court to undertake an error-correcting function, and it should decline to do so.

1. *Hurst* Did Not Create New Law Applicable To McConnell's Case.

Since the weighing of aggravators and mitigators is not, as McConnell argues, a necessary pre-condition for death eligibility in Nevada, the weighing determination is not an element of a capital offense. McConnell attempted to convince the Nevada Supreme Court that this Court's decision in *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) entitles him to relief. The Nevada Supreme Court rejected this claim, explicitly finding that *Hurst* did not create a previously unavailable legal claim that would constitute good cause to excuse state procedural bars. App., 9, fn. 5. This reasoning was well-supported, because 1) the capital sentencing scheme in Florida differs critically from Nevada's, and 2) unlike *Hurst*, it was a jury, not a judge, who made the factual finding regarding the existence of aggravators.

In *Hurst*, the Court found Florida's capital sentencing scheme unconstitutional because the maximum sentence a jury could impose was life in prison; yet, a judge could impose a death sentence after he independently found the

existence of and weighed the aggravating and mitigating circumstances. *Hurst* at 622. A jury in Florida could not make specific factual findings about the existence of mitigating or aggravating circumstances, it could not present a binding sentence of death. *Id*. The Court in *Hurst* based its holding on *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed. 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In *Apprendi*, the Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury. *Apprendi*, 530 U.S. at 494. In *Ring*, the Court held that "Arizona's capital sentencing scheme violated *Apprendi's* rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." 536 U.S. at 591. Specifically, "a judge could sentence Ring to death only after independently finding at least one aggravating circumstance." *Id*. at 592-93.

The *Hurst* Court found the Florida sentencing system unconstitutional because "[l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id*. at 622. In other words, "[a]s with *Ring*, a judge increased Hurst's authorized punishment based on her own fact finding." *Id.*

Here, on the other hand, a jury–not the trial judge, nor the Nevada Supreme Court–found three statutory aggravating factors were present, and concluded the death penalty was appropriate. *Hurst*, *Apprendi,* and *Ring* do not apply to these types of moral or non-factual determinations. The basic legal principle behind those

decisions is the idea that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury. *Apprendi*, 530 U.S. at 494. Thus, non-factual or moral determinations do not fall within the ambit of *Hurst*. The *Hurst* Court explained, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619. Because the *Hurst* Court applied *Apprendi* and *Ring*, which apply only to the necessary factual components needed to impose death, *Hurst*, itself, rejects the idea that it applies to moral and factual weighing of aggravator and mitigators.

2. Because *Hurst* Did Not Create A New, Previously Unavailable Legal Claim, Application of the Procedural Bar Was Proper.

The Nevada Supreme Court concluded that McConnell's most recent petition, filed more than five years after the remittitur, was untimely, having been filed well outside the statutory bar pursuant to NRS 34.726 (1). App, 2. That statute provides, in relevant part:

> 34.726. Limitations on time to file; stay of sentence
>
> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The reviewing court further observed that because the petition raised claims that were previously litigated and resolved on their merits, and new claims that could have been raised in prior proceeding, it constituted an abuse the writ pursuant to NRS 34.810. App. 2. That statute provides, in relevant part:

> 34.810. Additional reasons for dismissal of petition
>
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In his previous petition for writ of habeas corpus, McConnell argued, as he did in his subsequent petition, and in the current petition for writ of certiorari, that the jury should have been instructed that it must find the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. That argument was rejected by the Nevada Supreme Court in 2009:

> McConnell argues that the district court erred in rejecting his ineffective-assistance claim based on appellate counsel's failure to argue that the district court should have instructed the sentencing jury that the aggravating factors had to outweigh the mitigating factors beyond a reasonable doubt before it could impose death. We conclude that this ineffective-assistance claim lacks merit because the underlying legal argument would not have had a reasonable probability of success on appeal.
>
> Nevada statutes do not impose the burden suggested by McConnell's claim. Two specific provisions are relevant. First, NRS 200.030(4)(a), which outlines the range of punishment for a first-degree murder conviction, provides that death can be imposed "only if ... any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." Second, NRS 175.554(3), which addresses jury instructions, determinations, findings, and the verdict, states that "[t]he 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." Nothing in the plain language of these provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating

circumstances outweighed the aggravating circumstances in order to impose the death penalty.

McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314 (2009).

When McConnell raised the same argument again in 2016, the Nevada Supreme Court properly rejected it as abusive under the state statute, and concluded that nothing about the *Hurst* decision changed its analysis. App. 2, 8, fn. 5. For the reasons outlined in section 1 above, the Nevada Supreme Court's application of state law to procedurally bar McConnell's abusive claim was proper.

CONCLUSION

This Court should deny the petition for writ of certiorari because: 1) the question presented is based on a long-debunked interpretation of Nevada's capital sentencing scheme; 2) McConnell is inviting this Court to find that the Nevada Supreme Court misapplied state law; and 3) nothing in the *Hurst* decision operates to invalidate that state law.

DATED this 19th day of June, 2019.

Respectfully submitted

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