No.18-9349

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEE MCCONNELL, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

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

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

CAPITAL CASE

RENE L. VALLADARES
Federal Public Defender of Nevada
DAVID ANTHONY
Counsel of Record
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)
David_Anthony@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its brief in opposition, the State does not controvert Robert McConnell's argument that this Court's review is urgently needed because there is a conflict among the state and federal courts on an important question of federal law. To the contrary, the State acknowledges the Nevada Supreme Court itself has reached diametrically opposite conclusions on this very point of federal law. BIO at 5 (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)"). This concession repels the State's arguments that this case involves a question of state law or error correction.

The State apprehends the issue before this Court as whether a jury's weighing of aggravating and mitigating circumstances is part of the "death eligibility" determination under Nevada's capital sentencing scheme. BIO at i, 4, 7. Rather, McConnell argues the weighing process is subject to the constitutional protections identified in *Apprendi* because Nevada law "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). It is only after this finding is made that the jury is permitted to consider other aspects of a defendant's character and record, the impact on the victims, and any other circumstances relevant to the sentence.

Gallego v. State, 711 P.2d 856, 863 (Nev. 1985) ("If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to the sentence. NRS 175.552.").

If *Apprendi* and its progeny have taught us anything it is that the nomenclature used by the state courts to describe an element of an offense does not confine the reach of the constitutional jury trial right and due process guarantees. *See Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring, joined by Thomas, J.) ("[A]ll 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."). Even before *Apprendi*, this Court rejected a formalistic approach to understanding the contours of the due process right to proof beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). Instead, this Court "requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the state,' *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 [ ] (1914), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof." *Id.*

The Nevada Supreme Court has acknowledged that the functional effect of the jury's weighing determination is to expose the defendant to a punishment that exceeds the statutory maximum. *Nunnery v. State*, 263 P.3d 235, 250 (Nev. 2011) (assuming "the weighing determination increases the maximum sentence for first-

degree murder beyond the prescribed statutory maximum"). It does not matter what terms the Nevada Supreme Court and the State use to characterize this finding: it must be found by a jury and proven beyond a reasonable doubt.

The State does not address McConnell's argument that the Nevada Supreme Court's procedural rulings are not independent of federal law. Petition at 9 n.1. The State argues the state court found McConnell's claim procedurally defaulted, BIO at 9-11, but it does not argue that this ruling constitutes an independent and adequate state ground barring this Court's review. To the contrary, the State's phrasing of the question presented acknowledges that the determination whether McConnell's claim has merit is coterminous with whether he can show good cause to excuse any state procedural default rules. BIO at i-ii. As the State acknowledges, "[w]hen 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)." *Id.* at i. This Court has also acknowledged that this default ruling is not independent of federal law. *Rippo v. Baker*, 137 S. Ct. 905, 907 n.* (2017).

This Court therefore has jurisdiction to decide the important question of federal law presented here.

CONCLUSION

For the foregoing reasons, McConnell requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court.

DATED this 24th day of June, 2019.

Respectfully submitted,

RENE VALLADARES
Federal Public Defender of Nevada

DAVID ANTHONY
Counsel of Record
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
David_Anthony@fd.org

Counsel for Petitioner