Capital Case

Case No. 19-6863

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE MELVIN BONNELL, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

On Petition For Writ Of Habeas Corpus

PETITION FOR REHEARING

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A. INTRODUCTORY STATEMENT

In his original action filed with this Court, Petitioner complained in part regarding the failure of the jury to perform the narrowing/eligibility function. This Court and Respondent can comb the record for such a finding – the jury never made it because the trial court never instructed the jury on all the required elements.

While Respondent seemingly agreed, "[Ohio's scheme] tasks juries with finding *every* fact necessary to support a death sentence" (Brief in Opposition ("BIO") at 10) (emphasis added), the jury never made the factual finding that Bonnell was either the principal offender or committed the aggravated murder with prior calculation and design, both elements of the aggravating factor required to be proven beyond a reasonable doubt under Ohio law. The finding of this aggravating factor is an absolute constitutional prerequisite to Bonnell's death eligibility; yet a jury never made it. The trial court never instructed or tasked Bonnell's jury with having to render a verdict on this statutory element.

On February 24, 2020, the Court denied Bonnell's Petition for Writ of Habeas Corpus. The next day, this Court decided *McKinney v. Arizona*, Case No. 18-1109 (U.S. Feb. 25, 2020) (Slip Op.). *McKinney* reaffirmed the efficacy of the merits of Bonnell's Petition; thus necessitating filing this rehearing motion.

I. In light of the February 25, 2020, Opinion in *McKinney v. Arizona*, Case No. 18-1109, this Court should grant rehearing and reopen the original action because the denial in Bonnell cannot be reconciled with the subsequent *McKinney* decision.

Eligibility findings have been a staunch requirement post-*Furman*. With firm resolution, this Court noted in *McKinney* that:

> Under this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found. *See Tuilaepa v. California*, 512 U. S. 967 (1994); *Zant v. Stephens*, 462 U. S. 862 (1983); *Gregg v. Georgia*, 428 U. S. 153 (1976).

Slip Op. p. 1.

Later, this Court reiterated that *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Ring v. Arizona*, 536 U.S. 584 (2002), firmly ensconced the eligibility finding with the jury. This Court expressed:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible.

Slip Op. p. 4.

In *In re Davis*, 557 U.S. 952 (2009), this Court transferred an original habeas corpus petition to the district court for "hearing and determination" of the petitioner's claim of actual innocence. *Id.* at 952. As Justice Stevens explained in a concurring opinion, joined by Justices Breyer and Ginsburg, the "'exceptional' [circumstance] . . . warrant[ing] utilization of this Court's Rule 20.4(a), 28 U.S.C. Sec. 2241(b), and our original habeas jurisdiction" was the "substantial risk of putting an innocent man to death." *Id.* at 953. (Stevens, J., concurring, joined by Breyer and Ginsburg, JJ.).

Bonnell's petition for writ of habeas corpus presents a question of exceptional importance. It would be an exceptional circumstance to allow an execution to occur

when the jury never made the eligibility determination. *McKinney* and the long-standing precedents must mean something, otherwise the efficacy of this Court's precedent is undermined.

CONCLUSION

Based on the foregoing, this Court should grant Bonnell's Petition for Rehearing, reopen and grant this original proceeding.

Respectfully submitted,

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S.CT. RULE 44.2 CERTIFICATE OF COUNSEL

Under S. Ct. R. 44.2, I, Alan C. Rossman, do hereby certify that the foregoing Petition for Rehearing is limited to an intervening circumstance of a substantial or controlling effect, the subsequent February 25, 2020, Opinion in *McKinney v. Arizona*, Case No. 18-1109 (U.S. Feb. 25, 2020) (Slip Op.), and that the Petition for Rehearing is presented in good faith and not for delay.

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