No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

William Patrick Castillo, Petitioner,

v.

William Gittere, Warden, et al., Respondents.[1]

On Petition for Writ of Certiorari to the
Nevada Supreme Court

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE 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

[1] William Gittere is automatically substituted for Renee Baker as the Warden of Ely State Prison; Aaron Ford is automatically substituted for Adam Paul Laxalt as the Attorney General for the State of Nevada. FRCP 25(d).

No.

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

William Patrick Castillo, Petitioner,

v.

William Gittere, Warden, et al., Respondents.

Petitioner's Application to Extend Time to File Petition for Writ of Certiorari

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner William Patrick Castillo respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for sixty days to and including February 3, 2019. The Nevada Supreme Court issued its order denying rehearing on September 6, 2019. Absent an extension of time, the Petition for Writ of Certiorari would be due on December 5, 2019. Petitioner is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE EXTENSION

The time for filing a Petition for Writ of Certiorari should be extended for sixty days for the following reasons:

1. Counsel of record for Petitioner, Assistant Federal Public Defender David Anthony, has been unable to complete the Petition for Writ of Certiorari because of filing deadlines in other capital cases that could not be further extended as well as the existence of administrative responsibilities that had to be handled as Chief of the Capital Habeas Unit. Specifically, counsel has had to assist a case team with the filing of a federal petition in *Maestas v. Gittere*, Case No. 2:18-cv-02434-JAD-EJY, which currently has a statute of limitations deadline on November 25, 2019. Counsel has had to complete and file pleadings and meet with clients to transition two new capital cases into the habeas unit in *Nunnery v. Gittere*, Case No. 3:19-cv-00618-JAD-WGC, and *Pandeli v. Ryan*, Case No. 2:17-cv-01657-JJT, and counsel is designated as the lead attorney on both cases. Counsel has had to devote substantial time to litigation over the last ninety days in the case of *Lisle v. Gittere*, Case No. 2:03-cv-01006-MMD-DJA. Finally, counsel has also had to devote time and attention to Mr. Castillo's federal habeas action that is currently pending on appeal before the Ninth Circuit Court of Appeals. *Castillo v. Gittere*, No. 19-99003.

2. Mr. Anthony is also currently supervising eight federal trial cases and litigating discovery issues in those cases. Finally, counsel has had extensive administrative and case related travel over the past ninety days.

3. As a result of these obligations, counsel cannot complete the Petition for Writ of Certiorari before December 5, 2019. The sixty-day extension requested here will allow counsel to complete the Petition for Writ of Certiorari no later than February 3, 2020.

4. Mr. Castillo's certiorari petition will raise substantial issues regarding the application of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that warrant the consideration of the Court. His argument has been found meritorious by at least one justice of this Court, *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 410 (2013) (Sotomayor, J., dissenting from the denial of certiorari); has resulted in divided decisions among the state courts; has resulted in differing decisions by the Nevada Supreme Court, *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), *overruled by Nunnery v. State*, 263 P.3d 235 (Nev. 2011); and is an issue currently being litigated by eight Nevada death row inmates. Finally, Mr. Castillo's certiorari petition will raise substantial issues concerning the continuing validity of the Sixth Amendment ruling contained in this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738, 741, 745 (1990), in light of *Hurst*.

5. This Court has repeatedly noted that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of

criminal justice."). Capital litigants should be given every reasonable opportunity to be heard by the courts.

6. No meaningful prejudice to Respondents would arise from the extension as this Court would decide the matter in the October 2019 Term regardless of whether an extension was granted. Moreover, Mr. Castillo currently has a federal habeas proceeding that was not stayed at the district court level and which is currently pending in the Ninth Circuit Court of Appeals.

7. This request is not made solely for the purposes of delay or for any other improper purpose, but only to ensure that Mr. Castillo receives an opportunity to seek this Court's review of the constitutional claims that infect his death sentence.

DATED this 22nd day of November, 2019.

Respectfully submitted,

RENE VALLADARES
Federal Public Defender of Nevada

/s *David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
David_Anthony@fd.org

CERTIFICATE OF SERVICE

I hereby declare that on 22nd day of November, 2019, I served Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari on Respondents by depositing an envelope containing the Application in the United States mail, with first-class postage prepaid, addressed as follows:

Alexander Chen
Clark County Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89101

/s *David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

APPENDICES

APPENDIX A

APPENDIX A

135 Nev., Advance Opinion 16

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73465

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and Ellesse D. Henderson, Bradley D. Levenson, Tiffany L. Nocon, and David Anthony, Assistant Federal Public Defenders, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

Appellant William Castillo, who was sentenced to death in 1996, filed a procedurally barred postconviction petition for a writ of habeas

corpus asserting that he was entitled to a new penalty hearing. He claimed he demonstrated good cause and prejudice to excuse the procedural bars based on *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). He specifically argued that *Hurst* did two things: (1) it established that the weighing component of Nevada's death penalty procedures is a "fact" that must be proven beyond a reasonable doubt, and (2) it clarified that *all* eligibility determinations, regardless of whether they are factual, are subject to the beyond-a-reasonable-doubt standard. We recently rejected the first argument, *Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43, 53, *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018), and in doing so, we reaffirmed our prior decisions that a defendant is death-eligible in Nevada once the State proves beyond a reasonable doubt the elements of first-degree murder and at least one statutory aggravating circumstance, *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). We previously rejected the second argument that the beyond-a-reasonable-doubt standard does not apply to the weighing of aggravating and mitigating circumstances in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). Castillo fails to demonstrate that these prior decisions were incorrect or that *Hurst* compels us to reach a different result. Thus, he fails to demonstrate good cause to excuse the procedural bars, and the district court correctly denied his petition.

FACTS AND PROCEDURAL HISTORY

Castillo bludgeoned an elderly woman to death in 1995 and was sentenced to death. After this court affirmed the judgment of conviction on direct appeal, *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998), Castillo filed a postconviction petition for a writ of habeas corpus, which was denied. Later, he filed a second postconviction petition for a writ of habeas corpus,

which was also denied. In 2017, he filed the postconviction petition at issue here, his third petition filed in state court. Because the 2017 petition was not filed within one year after the remittitur issued from his direct appeal and because Castillo had previously sought postconviction relief, the district court denied it as untimely, *see* NRS 34.726, successive, *see* NRS 34.810(2), abusive, *see id.*, and barred by laches, *see* NRS 34.800(2), concluding that Castillo failed to demonstrate good cause and prejudice to excuse the various procedural bars. This appeal followed.

DISCUSSION

Under Nevada law, a petitioner cannot relitigate his sentence decades after his conviction by continually filing postconviction petitions unless he provides a legal reason that excuses both the delay in filing and the failure to raise the asserted errors earlier, and further shows that the asserted errors worked to his "actual and substantial disadvantage." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). Castillo argues that he demonstrated good cause and prejudice because the United States Supreme Court's decision in *Hurst* provided him with new and meritorious claims for relief that were not available earlier. *See Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006). To resolve this contention, we must determine whether his interpretation of *Hurst* has merit, which we undertake de novo. *See Huebler*, 128 Nev. at 197, 275 P.3d at 95.

The holding in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016)

In *Hurst*, the United States Supreme Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's death penalty statutes. The Florida statutes created a system where the jury considered evidence of aggravating and mitigating circumstances and then recommended to the judge whether to impose a

death sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. Under that system, the judge made the ultimate decision whether to impose a death sentence, including her own determination whether any aggravating and mitigating circumstances existed. *Id.* The Court held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance," violated the Sixth Amendment. *Id.* at ___, 136 S. Ct. at 624.

We considered *Hurst*'s impact on our death penalty system in *Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43 (2018). The appellant in that case argued that *Hurst* established, for the first time, that "where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt." *Id.* And pointing to language in some of this court's prior decisions stating that a defendant is not death-eligible unless a jury concludes both that there are aggravating circumstances and that any mitigating circumstances do not outweigh those aggravating circumstances, he argued that he was entitled to a new penalty hearing because the jury was not properly instructed on the burden of proof. *Id.* We disagreed for two main reasons. First, we held that the appellant was taking language in *Hurst* out of context and the decision did not announce new law relevant in Nevada. *Id.* at 53-54. Second, we explained that while some of this court's prior decisions described the weighing of aggravating and mitigating circumstances as part of the death-eligibility determination, we had reiterated in *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015), 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. *Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 54.

Hurst did not redefine the word "fact"

Castillo first argues that *Hurst* does more than merely analyze Florida's death penalty procedures in light of *Apprendi* and *Ring*. Pointing to language in *Hurst* describing the outcome of the weighing determination in Florida as a fact and suggesting it was a critical finding necessary to increase the defendant's sentence, Castillo asserts that *Hurst* establishes that whenever a State conditions death-eligibility on the weighing of aggravating and mitigating circumstances, the outcome of that weighing is a fact subject to the burden of proof beyond a reasonable doubt. We do not agree. As we indicated in *Jeremias*, a close reading of *Hurst* shows that the few references to the weighing component of Florida law as a factual finding involved quotations from the Florida statute. 134 Nev., Adv. Op. 8, 412 P.3d at 53-54. Our conclusion that *Hurst* broke no new ground in this area is consistent with that of "[m]ost federal and state courts," *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (footnotes omitted), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. March 13, 2019) (No. 18-8415), and Castillo fails to demonstrate that it was incorrect.

The beyond-a-reasonable-doubt standard only applies to facts

Castillo also raises a new argument that we have not previously considered: he suggests that *Hurst* eliminated the distinction between factual findings and other determinations for purposes of applying *Apprendi* in the context of capital sentencing. He contends that, under *Hurst*, regardless of whether the jury is being asked to make a factual finding, a moral determination, or something else altogether, if its decision makes a defendant death-eligible, it is an element of the capital offense and therefore must be alleged in the charging document, submitted to a jury, and proven beyond a reasonable doubt. Nothing in *Hurst* can be read to

support this assertion. Like *Apprendi* and *Ring*, *Hurst* clearly limits its reach to *facts* that expose a defendant to a higher sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 619 (holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death" (emphasis added)); *accord Ring*, 536 U.S. at 589 (holding that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any *fact* on which the legislature conditions an increase in their maximum punishment" (emphasis added)); *Apprendi*, 530 U.S. at 490 (holding that "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added)). Indeed, to support his argument that *Hurst* extends the *Apprendi* rule to all determinations, regardless of whether they involve fact-finding, Castillo circles back to the same mischaracterized language in *Hurst* discussed above, which uses the word "fact" when quoting the Florida statute. We find no credence in the assertion that the Court's scattered references to the language in Florida's statute were intended to broaden the reach of *Apprendi* and *Ring* by obliterating the distinction between factual findings and moral choices regarding the weight to ascribe to a factual finding. *See generally In re Winship*, 397 U.S. 358, 363 (1970) (discussing the genesis of the burden of proof beyond a reasonable doubt and its role in reducing the risk of convictions resting on factual error). Castillo fails to demonstrate that *Hurst* announced a new rule relevant to the weighing component of Nevada's death penalty statutes.

The weighing determination is not part of death-eligibility

Even if *Hurst* announced the new rule Castillo advances, we reiterate that it would have no impact because the weighing of aggravating

and mitigating circumstances is not part of death-eligibility under our statutory scheme. *See Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. In Nevada, the facts that expose a defendant to a death sentence, and therefore render him death-eligible for the purposes of *Apprendi* and *Ring*, are the elements of first-degree murder and any statutory aggravating circumstance.[1] *Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 54; *Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3); NRS 200.030(4)(a), that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed, *Apprendi*, 530 U.S. at 481 (acknowledging that, at common law, a sentencer always had the discretion to "tak[e] into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"), and checks the unfettered exercise of that discretion, *see generally Gregg v. Georgia*, 428 U.S. 153, 220-21 (1976) (White, J., concurring) (indicating that systems of capital punishment that give the sentencer unguided discretion are cruel and unusual).

CONCLUSION

Because Castillo's arguments regarding *Hurst* lack merit, he fails to demonstrate good cause and prejudice to excuse the various procedural bars precluding him from challenging his sentence at this late

---

[1]We reject Castillo's argument that he should be permitted to take advantage of the apparent confusion caused by our prior lack of precision when using the term "eligibility." As Castillo himself points out, "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

date. We therefore conclude that the district court did not err by denying Castillo's postconviction petition for a writ of habeas corpus and affirm.[2]

_____, J.
Stiglich

We concur:

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cadish

_____, J.
Silver

---

[2]Castillo also argues that *Hurst* establishes that the practice of appellate reweighing of aggravating and mitigating circumstances is unconstitutional. Setting aside the fact that *Hurst* says nothing on this issue, the Supreme Court has permitted appellate reweighing. *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990). The Court has not overruled *Clemons* and therefore it remains good law. *See Bosse v. Oklahoma*, 580 U.S. ___, ___,137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998))).

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73465

ORDER DENYING REHEARING

FILED
SEP 06 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

cc: Hon. William D. Kephart, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk