No. 19-7647

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

William Patrick Castillo, Petitioner,

v.

William Gittere, Warden, et. Al., Respondent.

Antonio Lavon Doyle, Petitioner,

v.

William Gittere, Warden, et. Al., Respondent.

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

PETITONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners presented two questions for this Court to consider. The first concerned whether this Court should overrule *Clemons v. Mississippi*, 494 U.S. 738 (1990), and the second concerned whether the Nevada Supreme Court violated Petitioners' constitutional rights by rendering the outweighing determination an afterthought for the jury, used only to lessen a death sentence to life imprisonment.

In its brief in opposition, the State entirely ignores the second question Petitioners presented and conceded many important points inherent in Petitioners' first question presented. Instead of addressing the various arguments Petitioners offered to justify this Court's review, the State largely repeats verbatim the arguments it made before the Nevada Supreme Court. As a result, the State offers no meaningful arguments as to why certiorari should not be granted, and this Court should decide those important questions of federal law.

A. The State entirely ignored Petitioners' second question presented.

In its brief in opposition, the State entirely fails to address the second question presented. Instead, the State recharacterizes the second question as "[w]hether the Nevada Supreme Court did not violate Petitioner's rights by requiring the jury to determine whether the mitigating circumstances did not outweigh the aggravating circumstances in imposing the death penalty." BIO at i. Consequently, the State spends many pages addressing Petitioners' arguments on a separate issue before the Nevada Supreme Court—but entirely fails to address

Petitioners' arguments before *this* Court regarding the Nevada Supreme Court's unconstitutional ruling.

Even without the State's concession, the Nevada Supreme Court's decision conflicts with a line of this Court's Sixth Amendment precedent, *e.g.*, *Andres v. United States*, 333 U.S. 740 (1948), which demands this Court's intervention. *See* Petition at 24–27; U.S. Sup. Ct. R. 10(c) (listing, as compelling reason to grant review, cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). The Nevada Supreme Court's decision also raises an important federal question: whether a capital sentencing scheme can require the jury to qualify a finding of death-eligibility. *Cf.* Petition at 27–28; U.S. Sup. Ct. R. 10(c) (contemplating this Court's review to "decide[] an important question of federal law that has not been, but should be, settled by this Court"). The State did not address these arguments, and this Court should grant Petitioners' petition for writ for certiorari to review this important federal question.

B. The State's makes only cursory and unpersuasive arguments opposing this Court's grant of certiorari on the first question presented.

The State recites the standard for this Court's discretionary review under Rule 10. BIO at 11–13. But, in the remainder of its brief in opposition, the State fails to support its argument that the petition here does not meet that standard. Instead, the State makes several concessions that support, rather than undermine, the reasons given in the petition for this Court's review. And, to the extent that the State addresses Petitioners' arguments, the State relies on differences in

interpretations of this Court's caselaw—reliance appropriate for merits briefing, not a brief in opposition.

The State contends that Petitioners incorrectly interpret this Court's decision in *Hurst*, based on interpretations by other state and federal courts. BIO at 19–23, 31–32. Petitioners interpret *Hurst*, in accordance with its plain language, to require juries to make every determination necessary before increasing a potential sentence from life to death. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *see also id.* at 622 ("Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty."). In states like Nevada, this includes the weighing step, because Nevada requires a jury finding that mitigating evidence does not outweigh aggravating factors as a precondition before consideration of the death penalty. *See* 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) (death is available punishment for first-degree murder "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").

True enough, several states have come to the opposite conclusion concerning their own capital sentencing schemes. *See* BIO at 20–23 (citing cases from other

jurisdictions). But those states lack the three-step capital sentencing scheme that the Nevada legislature has adopted. *See, e.g.*, *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) ("[B]ecause in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment."), *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831 (2017); *People v. Jones*, 398 P.3d 529, 553 (Cal. 2017) (explaining that defendant was death eligible after jury found him guilty of first-degree murder and found one special circumstance); *State v. Mason*, 111 N.E.3d 432, 444 (Ohio 2016) ("The trial court in this case ignored the most important feature that renders Ohio's death-penalty statute constitutional under the Sixth Amendment through *Apprendi*, *Ring*, and *Hurst*—that the jury, not the judge, determines beyond a reasonable doubt the existence of an aggravating circumstance—the feature that subjects a defendant to the possibility of death as a sentence."); *Rayford v. State*, 125 S.W.3d 521, 533 (Tex. Crim. App. 2003) ("[W]hen the State is seeking the death penalty, the prescribed statutory maximum is death. It is not an 'enhancement' of the prescribed maximum sentence of life; it is an alternative available sentence.").

In any event, even if these states had Nevada's three-step sentencing scheme, the State itself acknowledges a split—the Delaware Supreme Court after *Hurst* invalidated the state's capital sentencing scheme "because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did

not require juror unanimity." BIO at 24–25 (citing *Rauf v. State*, 145 A.3d 430 (Del. 2016)); *see also* BIO at 28. The existence of this split is a reason to grant certiorari, not deny it. *See* Sup. Ct. R. 10(b).

The State also relies on this Court's previous treatment of this issue to support its argument that it should deny certiorari here—this Court's denial of certiorari in *Rangel v. California*, 137 S. Ct. 623 (2017), and *Bohannon v. Alabama*, 137 S. Ct. 831 (2017), and its refusal in *Hurst* to overrule *Walton v. Arizona*, 497 U.S. 639 (1990). BIO at 21, 23–24. As this Court has explained, a denial of certiorari is in no way a commentary on the merits of a case and has no precedential effect. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion on the merits of the case.'" (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). As for *Walton*, the State misleadingly conflates the Sixth Amendment and Eighth Amendment holdings. BIO at 23–24. Petitioners base their arguments on the former—which this Court overruled nearly twenty years ago. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both.").

The State similarly relies on this Court's treatment of *Clemons* in *McKinney v. Arizona*, 140 S. Ct. 702 (2020). BIO at 33–34. In *McKinney*, this Court concluded that *Clemons* remained good law in Arizona for a petitioner whose conviction was final before *Ring*. *McKinney*, 140 S. Ct. at 707–08. But this Court also explained that the issue it was deciding was "narrow," *id.* at 706—it involved a unique

procedure in a state, Arizona, with a different capital sentencing scheme. *Id.* at 706. Importantly, Arizona does not have Nevada's three-step capital sentencing statute. *See* Ariz. Rev. Stat. § 13-752.

In addition, until this Court decided *Ring*, trial judges in Arizona, not juries, decided whether aggravating circumstances existed and death was warranted. *See McKinney*, 140 S. Ct. at 706. Thus, this Court's determination that appellate judges in Arizona could perform the weighing step is law for Arizona, but nonbinding dicta for states like Nevada (particularly after *Ring*). *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007); *cf. Valerio v. Crawford*, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (distinguishing between appellate factfinding when original factfinder was judge versus when original factfinder was jury). Just as appellate judges can no longer find the existence of an aggravating factor in Arizona, because that is the role of juries post-*Ring*, appellate judges in Nevada cannot perform *either* prerequisite for consideration of the death penalty in Nevada, i.e., the finding of aggravators or outweighing.

The State next argues that this Court should not grant review because, according to the State, *Hurst* is not retroactive under federal retroactivity standards. BIO at 27–28. But Petitioners seek certiorari from a state court decision where the Nevada Supreme Court did not make any adverse finding that *Hurst* should not be applied retroactively. And Nevada's retroactivity rules are more relaxed than those that apply under this Court's decision in *Teague*. *See Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002). This Court should decline to consider this

state law question, particularly because the Nevada Supreme Court denied Petitioners relief on different grounds. *See generally Castillo v. State*, 442 P.3d 558 (Nev. 2019); *Doyle v. State*, 448 P.3d 552 (Nev. 2019) (unpublished table disposition); *see also Powell v. State*, 153 A.3d 69, 74–76 (Del. 2016) (concluding that state decision invalidating capital sentencing scheme after *Hurst* applied retroactively under state law).

The State finally raises arguments about the merits of Petitioners' first question presented, contending that (1) outweighing is a moral determination, not a factual determination subject to the requirements of *Apprendi* and its progeny; (2) weighing is Nevada is part of "selection," not "eligibility," and, consequently, *Apprendi* and its progeny do not apply; and (3) appellate courts conducting reweighing are "merely utilize[ing] the factual findings of a jury." BIO at 18–37. There are two significant problems with these arguments, however.

First, these arguments highlight the disagreement involved in interpreting this Court's Sixth Amendment jurisprudence, which support the appropriateness of certiorari review here. Petitioners argue that, under Sixth Amendment law, it is irrelevant whether outweighing in Nevada is characterized as a "moral" determination, a "selection" determination, or "Mary Jane." *See Ring*, 536 U.S. at 610 (Scalia, J., concurring); *see also Apprendi v. United States*, 530 U.S. 466, 494 (2000) ("[T]he 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?"). What matters is outweighing increases the maximum

available penalty from life to death, so it must be done by a jury, not an appellate court. The State disagrees. And Petitioners argue that the Nevada Supreme Court improperly conducts reweighing on appeal, while the State argues the court is merely performing harmless error review.[1] Again, the fact that disagreement exists about these issues is a reason to *grant* certiorari, not deny it. *See* Sup. Ct. R. 10.

Second, the State's arguments largely fail to respond to the first question presented. Instead, the State rewrites Petitioners' first question presented, then argues that its rewritten version is not worthy of this Court's consideration. *See* BIO at 18–27. But a comparison between the actual first question presented and the State's version reveals the importance of the federal question involved: Petitioners argued that juries, not appellate judges, must make the outweighing determination in Nevada, while the State responds only to an argument that outweighing should be performed beyond a reasonable doubt. *Compare* Pet. at 12–24, *with* BIO at 18–27.[2] The State then argues that *Hurst* is a Sixth Amendment case, not a Due Process case concerning the burden of proof. BIO at 18–27. To be clear, the second question presented is based *almost entirely* on the Sixth Amendment right to a jury

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[1] The Nevada Supreme Court believes that reweighing and harmless error review are the same thing, *State v. Haberstroh*, 69 P.3d 676, 682–83 (Nev. 2003), which only amplifies the need for this Court's review.

[2] Although Petitioners had raised arguments in the Nevada Supreme Court about *Hurst* and the correct standard of proof, they did not include those arguments in their petition to this Court. In any event, the State is simply incorrect. This Court in *Hurst* explained that the Sixth Amendment right to a jury trial, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury *beyond a reasonable doubt*." *Hurst*, 136 S. Ct. at 621 (emphasis added); *see Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("It is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth amendment requirement of a jury verdict are interrelated.").

trial: In states like Nevada, where outweighing is a condition precedent to consideration of the death penalty, juries must make that finding, not appellate judges. That did not happen in Petitioners' cases (though the State incorrectly asserts the contrary, BIO at 20).

The State also makes two important concessions. First, the State concedes that weighing, in Nevada, is a "necessary finding[] for the death penalty." BIO at 20; *see also* BIO at 25 (explaining that, in Nevada, weighing is "part of death 'eligibility' to the extent a jury is precluded from imposing death if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstances"). Second, the State concedes that the Florida Supreme Court, on remand from *Hurst v. Florida*, 136 S. Ct. 616 (2016), interpreted *Hurst* to require "that all critical findings necessary to imposition of the death penalty . . . be found by the jury, not the judge." BIO at 19–20 (citing *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016)).[3] Taken together, these concessions prove Petitioners' point that the weighing determination is a critical finding that a jury, not appellate judges, must make.

Because the State has provided no persuasive reason why this Court should decline to consider the merits of the first question presented, this Court should grant certiorari on this issue to decide the important federal question whether

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[3] The Florida Supreme Court has since retreated from its ruling in *Hurst v. State*. *See State v. Poole*, __ So.3d __, 2020 WL 370302 (Fla. 2020). Petitioners argued in their petition that the wild divergence by the Florida and Nevada courts in their own case law on this point was a reason warranting this Court's review of the question presented here.

Clemons remains good law in Nevada and similar states where outweighing in the penultimate, rather than the ultimate finding for a capital sentencing jury. *See* Sup. Ct. R. 10(c).

C. The State does not address or dispute that the Nevada Supreme Court's treatment of the state procedural bars were intertwined with federal law.

In its brief in opposition, the State argued that Petitioners failed to raise a federal question because "the State procedural bars constitute an adequate and independent state law ground precluding relief." BIO at 13.

As explained in the petition, although the Nevada Supreme Court denied Petitioners claim on the basis of procedural default, those procedural bars were intertwined with federal Sixth Amendment law. *See* Petition at 10, fn. 2. Because the Nevada Supreme Court's decision turned on the resolution of a federal question, the default ruling was not independent of federal law. *See id.*; *Castillo v. State*, 442 P.3d 558 (Nev. 2019) (holding that Mr. Castillo failed to overcome procedural bars "[b]ecause Castillo's arguments regarding *Hurst* lack merit"). The State fails to respond to these points, which should be deemed a concession that this Court's review is not precluded here. *See* U.S. Sup. Ct. R. 15. 2 ("Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.").

CONCLUSION

The State does not meaningfully address or rebut Petitioners' arguments that this Court's review is warranted. Because the Nevada Supreme Court's decision in Petitioners' cases implicate important questions of federal constitutional law, the petition for a writ of certiorari should be granted and the Nevada Supreme Court's judgment should be reversed.

DATED this 19th day of March, 2020.

Respectfully submitted,

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