No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL HOWARD,

Petitioner,

v.

STATE OF NEVADA

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether appellate reweighing is constitutional after *Hurst v. Florida*, 136 S. Ct. 616 (2016).
2. Whether *Hurst* is retroactive.

PARTIES TO THE PROCEEDINGS BELOW

In addition to those listed in the caption, the parties to the proceedings below included Timothy Filson, former Warden at Ely State Prison, in Nevada, and Adam Paul Laxalt, former Attorney General of Nevada.

RELATED PROCEEDINGS

I. Federal Court

A. Supreme Court

1. *Howard v. Nevada*, No. 14-8546, cert. denied April 27, 2015
2. *Howard v. Nevada*, No. 92-8909, cert. denied Oct. 4, 1993
3. *Howard v. Nevada*, No. 86-6937, cert. denied Oct. 5, 1987

B. U.S. Court of Appeals for the Ninth Circuit

1. *Howard v. Gittere*, No. 19-70384, pending
2. *Howard v. Baker*, No. 10-99003, pending

C. U.S. District Court for the District of Nevada

1. *Howard v. Gittere*, No. 2:19-cv-247, pending
2. *Howard v. Gittere*, No. 2:93-cv-1204, pending
3. *Howard v. Godinez*, No. CV-N-91-196, closed March 11, 1992
4. *Howard v. Whitley*, No. CV-N-88-264, dismissed June 23, 1988

II. Nevada State Court

A. Supreme Court

1. *Howard v. State*, No. 73223, remittitur issued Oct. 15, 2019

2. *Howard v. State*, No. 57469, remittitur issued Oct. 20, 2014

3. *Howard v. State*, No. 42593, remittitur issued Jan. 28, 2005

4. *Howard v. State*, No. 23386, remittitur issued Oct. 28, 1993

5. *Howard v. State*, No. 20368, remittitur issued Feb. 14, 1991

6. *Howard v. State*, No. 15113, remittitur issued Feb. 12, 1988

B. Clark County, Nevada District Court[1]

1. *Howard v. State*, Nos. 81C053867; A-18-780434-W, pending

2. *Howard v. State*, petition denied May 15, 2017

3. *Howard v. State*, petition denied Nov. 5, 2010

4. *State v. Howard*, petition denied Oct. 21, 2003

5. *State v. Howard*, petition denied July 7, 1992

6. *Howard v. State*, petition denied April 28, 1989

[1] Unless otherwise indicated, all of the listed Clark County District Court proceedings were held exclusively in case number 81C053867.

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Petitioner Samuel Howard respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, at App. 1–3, and is available at *Howard v. State*, No. 73223, 2019 WL 4619525 (Nev. Sept. 20, 2019) (per curiam).

JURISIDICTIONAL STATEMENT

On September 20, 2019, the Nevada Supreme Court issued its decision. App. 1–3. The petition is timely filed, as Justice Kagan extended the deadline for filing to February 17, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which read in pertinent part:

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

U.S. Const., amend. VI.

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. XIV, § 1.

STATE STATUTES INVOLVED

This petition implicates Nev. Rev. Stat. § 175.554(3), which provides: "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."

STATEMENT OF THE CASE

Mr. Howard was convicted in 1983 of first-degree murder in Nevada state court. App. 14. At the penalty phase of his trial, Mr. Howard was sentenced to death on the basis of two aggravating circumstances: (1) a previous conviction for a violent felony in New York; and (2) committing the charged murder while engaged in the commission of robbery. App. 14–15. In 2014, the Nevada Supreme Court invalidated the second aggravating circumstance, leaving only the first. *See Howard v. State*, No. 57469, 2014 WL 3784121, at *6 (Nev. July 30, 2014). With only the single aggravator still standing, the Court reweighed it against the mitigating evidence presented by the defense at trial and upheld the death sentence. *See id.*

The instant matter relates to Mr. Howard's fifth application for state post-conviction relief. In that application, Mr. Howard challenged the Nevada Supreme Court's 2014 ruling upholding the death sentence by virtue of the remaining aggravating circumstance. App. 44–45. He attacked the ruling on the ground that the Nevada Supreme Court improperly reweighed the mitigating circumstances against the remaining aggravating circumstance in violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), which requires a jury to find all facts that permit the imposition of a death sentence. App. 44–45.

Granting the State's motion to dismiss, the state district court concluded that "*Hurst* does not stand for the proposition that appellate reweighing is unconstitutional." App. 32. On appeal, the Nevada Supreme Court rejected Mr. Howard's appellate-reweighing claim with reference to *Castillo v. State*, 442 P.3d 558 (Nev. 2019) (en banc), *cert. pet. filed* Feb. 3, 2020. App. 2. In *Castillo*, the Nevada Supreme Court unequivocally held that appellate reweighing is still allowed in the wake of *Hurst*. Specifically, the court recognized Mr. Castillo's view "that *Hurst* establishes that the practice of appellate reweighing of aggravating and mitigating circumstances is unconstitutional." *Castillo*, 442 P.3d at 561 n.2. It then rejected Mr. Castillo's position based on its belief that "*Hurst* says nothing on" the matter and that this Court's precedent sanctioning appellate reweighing "remains good law." *Id.* By incorporating its reasoning from *Castillo* below, the Nevada Supreme Court made plain that it was relying on its conclusion that *Hurst* left the practice of appellate reweighing untouched.

Mr. Howard then filed this timely certiorari petition.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide If Appellate Reweighing Is Still Constitutional.

Despite the concerns that *Hurst* creates regarding the propriety of appellate reweighing, lower courts continue to engage in the practice. This Court should accordingly take up the question, and the instant petition presents the perfect chance to do so.

A. *Hurst* Raises Serious Concerns About Appellate Reweighing's Constitutionality.

The reasoning of *Hurst* renders appellate reweighing constitutionally suspect.

Hurst nullified Florida's capital scheme for affording judges too much say in the sentencing process, contrary to the Sixth Amendment. In so doing, the Court repeatedly framed its holding in terms of a jury's constitutionally guaranteed right to make all findings "*necessary* to impose the death penalty." *Hurst*, 136 S. Ct. at 622; *see also id.* at 619, 624.[2] One determination that is indisputably "necessary to impose a sentence of death," in Florida, Nevada, and every other capital jurisdiction, is that the aggravation outweighs the mitigation. *See id.* at 619; *see also id.* at 622 (striking down the Florida statute because the "[t]he trial court alone must find the facts . . . [t]hat sufficient aggravating circumstances exist *and* [t]hat there are *insufficient mitigating circumstances to outweigh the aggravating circumstances*"); 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."); *see also Brown v. Sanders*, 546 U.S. 212, 216–17 (2006) (reiterating that "in *all* capital cases the sentencer must be allowed to weigh the" aggravation against the mitigation). The plain language of *Hurst* thus obligates juries to make all requisite findings of fact not just when aggravators are

[2] In this petition, unless otherwise noted, all internal quotation marks and citations are omitted, all alterations are in original, and all emphasis is added.

found, but also when those aggravators are weighed against the mitigating evidence.

By its very nature, that prohibition applies to appellate reweighing.

Judge Briscoe cogently explained why in a separate writing in *Pavatt v. Royal*, 894 F.3d 1115 (10th Cir. 2017).[3] As Judge Briscoe noted, appellate reweighing is "of questionable validity in light of . . . *Hurst*." *Id.* at 1153. "[T]he implications of *Hurst* seem clear," Judge Briscoe continued, because appellate reweighing "requires an appellate court to make a new and critical finding of fact, i.e., whether the remaining valid aggravating circumstances outweigh any mitigating circumstances," and under *Hurst*, "such a factual finding can be made only by a jury." *Id.* Recent scholarship agrees with, and elaborates upon, the same dynamic. *See* Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'P'Orth of Tar: The Need to Revisit* Caldwell*,* Clemons*, and* Profitt*,* 70 U. Miami L. Rev. 1118, 1148–52 (2016) (arguing that appellate reweighing is unconstitutional under *Hurst*).

The authorities from this Court previously approving of appellate reweighing have likewise been cast under a constitutional shadow by *Hurst*. Most important in

[3] The Tenth Circuit granted rehearing en banc in *Pavatt* and vacated the opinion to which Judge Briscoe wrote separately. *See Pavatt v. Carpenter*, 904 F.3d 1195 (10th Cir. 2018). The en banc court then released an opinion that did not address the appellate-reweighing issue. *See Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc), *cert. denied*, --- S. Ct. ----, 2020 WL 411708 (2020). Here, Mr. Howard relies upon Judge Briscoe's separate opinion in the earlier decision not as precedent, but to show that *Hurst* engenders substantial doubt about appellate reweighing's constitutional legitimacy in the minds of reasonable jurists, which is the reason that certiorari is warranted.

that regard is *Clemons v. Mississippi*, 494 U.S. 738 (1990). Although *Clemons* blessed appellate reweighing in 1990, the case's jurisprudential foundation has eroded substantially. Specifically, *Hurst* expressly overruled two of the opinions undergirding *Clemons*' holding: *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984). *See Clemons*, 494 U.S. at 746 (citing *Hildwin* and *Spaziano*). The language *Hurst* used to abrogate these cases is telling: "*Spaziano* and *Hildwin* summarized earlier precedent to conclude that the Sixth Amendment does not require that *the specific findings authorizing the imposition of the sentence of death* be made by the jury. Their conclusion was wrong, and irreconcilable" with later precedent. *Hurst*, 136 S. Ct. at 623. As observed above, it is that very principle that forbids appellate reweighing. As a result, the precedent upon which appellate reweighing has been built has been destabilized by *Hurst*.

B. Lower Courts Continue To Engage In Appellate Reweighing.

Despite the constitutional uncertainty that *Hurst* has created around appellate reweighing, state courts around the country persist in the practice, including in three of the most active death penalty jurisdictions in the country. *See, e.g.*, *Castillo*, 442 P.3d at 561 n.2; *State v. Hedlund*, 431 P.3d 181, 184–85 (Ariz. 2018), *cert. pet. filed* (19-5247) (July 18, 2019); *Tyron v. State*, 423 P.3d 617, 656–57 (Okla. Crim. App. 2018), *cert. denied*, 139 S. Ct. 1176 (2019).[4] The phenomenon is

[4] Nevada, Arizona, and Oklahoma collectively hold 242 death-row inmates. *See* The Death Penalty Information Center, *The Death Penalty in 2019: Year End Report*, at Death Row By State, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report [hereinafter "DPIC 2019 Report"].

widespread and in the absence of this Court's intervention it will continue, resulting in the affirmance of numerous death sentences for defendants who should instead be able to present their cases to juries under the Sixth Amendment.

Furthermore, some state courts have, post-*Hurst*, invoked harmless error analysis when aggravators are struck on appeal, which can closely resemble reweighing. Like appellate reweighing, this kind of harmless error review is also taking place in states with high volumes of capital litigation. *See, e.g.*, *Hicks v. State*, --- So. 3d ----, 2019 WL 3070198, at *19–24 (Ala. Crim. App. 2019) (striking an aggravator and then finding the error harmless, under a framework that considers the remaining aggravators in comparison to the mitigation); *Middleton v. State*, 220 So. 3d 1152, 1172 (Fla. 2017) (similar).[5] For the same reason that appellate reweighing has become constitutionally suspect in the wake of *Hurst*, so too has this type of harmless-error review, for both involve courts striking a new balance that only a jury is permitted to strike. The lingering presence of harmless-error review in this context, alongside appellate reweighing, consequently makes certiorari review even more necessary.

[5] Florida and Alabama have the second- and fourth-most death-row inmates in the country, respectively. *See* DPIC 2019 Report at Death Row By State. There are a total of 525 such inmates in the two states, which comprises roughly twenty percent of the prisoners under sentence of death in the country. *See id.*

C. This Case Is A Good Vehicle For Clarifying That Appellate Reweighing Is Impermissible.

Because the Nevada Supreme Court below resolved the appeal squarely on the ground that appellate reweighing remains lawful after *Hurst*, the case is an ideal vehicle for correcting that misunderstanding.

As set forth above in the statement of the case, the continuing legitimacy of appellate reweighing was raised, argued, and decided at every stage of this case. Most significantly, the Nevada Supreme Court adjudicated the appeal exclusively on the ground that appellate reweighing remains appropriate in the wake of *Hurst*. Specifically, the Nevada Supreme Court rejected Mr. Howard's appellate-reweighing claim with a single citation to *Castillo*, *see* App. 2, where the Nevada Supreme Court expressly stated that *Hurst* did not disturb the practice of appellate reweighing, *see Castillo*, 442 P.3d at 561 n.2. Since that is the conclusion that Mr. Howard is challenging here, his case is the perfect opportunity to take up the question.

II. The Court Should Decide If *Hurst* Is Retroactive.

An equally compelling basis to grant certiorari, either instead of or in addition to the foregoing one, is to determine whether *Hurst* is retroactive.

A. There Is A Split Over Whether *Hurst* Is Retroactive.

There is a clear division in the lower courts regarding *Hurst*'s retroactivity *vel non*. The Florida and Delaware Supreme Courts have both deemed the opinion retroactive. *See Mosley v. State*, 209 So. 3d 1248, 1274–83 (Fla. 2016); *Powell v. State*, 153 A.3d 69, 75–76 (Del. 2016). In contrast, state appellate courts in

Nebraska, Ohio, and Alabama have concluded that *Hurst* should not be given retroactive effect. *See State v. Mata*, 934 N.W.2d 475, 482–83 (Neb. 2019); *State v. Lorraine*, 120 N.E.3d 33, 40–41 (Ohio Ct. App. 2018), *rev. denied*, 114 N.E.3d 1206 (Ohio) (table), *cert. den'd*, 139 S. Ct. 2724 (2019); *Reeves v. State*, 226 So. 3d 711, 757 (Ala. Crim. App. 2016). This well-defined split calls for the Court's resolution.

B. This Case Is A Good Vehicle For Resolving The Split.

Mr. Howard's petition gives the Court a clean case for settling the division in authority over *Hurst*'s retroactivity. Mr. Howard's challenge to appellate reweighing was raised in post-conviction, long after his conviction became final. *See* App. 38–47. As a consequence, he is only eligible for relief if *Hurst* is retroactive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (clarifying that retroactive rules must be applied by state post-conviction courts); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (holding that new constitutional rules must be applied to cases pending on direct review without any need for retroactivity analysis). To adjudicate the case, the Court would have to determine whether *Hurst* is retroactive. Since that is the question upon which there is disagreement below, the case is a strong candidate for granting review.

III. Alternatively, The Court Should Summarily Remand.

If full merits review of the case is not afforded, a summary remand would be appropriate for consideration below of this Court's forthcoming opinion in *McKinney v. Arizona*, No. 18-1109. In that case, the Court has granted certiorari and heard oral argument on a series of issues involving the current role of appellate

reweighing in capital proceedings. *See McKinney v. Arizona*, 139 S. Ct. 2692 (2019); Cert. Pet., filed Feb. 21, 2019. Because those issues are central to the present certiorari petition, the Court's decision in *McKinney* will be highly relevant. The Nevada courts should have an opportunity to ensure that their resolution of Mr. Howard's case is consistent with the latest precedent from this tribunal. Accordingly, Mr. Howard respectfully asks the Court to hold his certiorari petition until *McKinney* has been decided and to then issue a summary remand for his case to be reconsidered in light of the opinion in that appeal.

Other petitions raising similar issues are also pending at the Court. For instance, in *Castillo v. Nevada*, *supra*, the petition for certiorari directly targets the constitutionality of appellate reweighing in Nevada. Mr. Castillo also referred in his filing to a number of other Nevada cases that are expected to arrive at this Court's doorstop soon, concerning overlapping questions. *See* Cert. Pet., filed Feb. 3, 2020, at 29.

Still other petitions broach the subject of whether a judge at the *trial* level can take the weighing process in capital proceedings away from the jury. *See, e.g.*, *Wood v. Missouri*, No. 19-967. If it is unconstitutional for a trial judge instead of a jury to handle such weighing, it is equally unconstitutional for an appellate court to do the same. A merits decision in *Wood* or similar appeals would therefore profoundly impact Mr. Howard's case.

Mr. Howard respectfully asks that the Court hold his petition until these other cases are disposed of and—if any are resolved on the merits—to summarily remand in light of that resolution.

CONCLUSION

The right to a jury trial is "one of the Constitution's most vital protections against arbitrary government," *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019), and "the death penalty is the most severe punishment" known to the law, *Roper v. Simmons*, 543 U.S. 551, 568 (2005). To protect the guarantee, appellate courts should not be able to impose death sentences in place of juries, and the petition for writ of certiorari should be granted.

Respectfully submitted this 11th day of February 2020.

Respectfully submitted,

/s/Jonah J. Horwitz

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