No. 19-7680

IN THE SUPREME COURT OF THE UNITED STATES

March 13, 2020

SAMUEL HOWARD, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

JONAH J. HORWITZ*
Idaho Bar# 010494
DEBORAH A. CZUBA
Idaho Bar #009648
Federal Defender Services of Idaho, Inc.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
(208) 331-5530

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

*Counsel for Appellant

Counsel for Respondent

QUESTION PRESENTED

CAPITAL CASE

1. Whether this Court should not overrule Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990) because it is not inconsistent with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

2. Whether the Nevada Supreme Court did not violate Petitioners' rights by requiring the jury to determine whether the mitigating circumstances did not outweigh the aggravating circumstances in imposing the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page Number:

Statutes

Other Authorities

No. 19-7680

IN THE SUPREME COURT OF THE UNITED STATES

March 13, 2020

SAMUEL HOWARD, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On May 20, 1981, Samuel Howard (hereinafter "Petitioner") was indicted on two counts of robbery with use of a deadly weapon and one count of murder with use of a deadly weapon.

The guilt phase of the trial began on April 11, 1983, and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Petitioner moved for a mistrial or elimination of the

death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Petitioner's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Petitioner over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Petitioner had instructed them not to present any mitigation evidence. Petitioner also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. The district court canvassed Petitioner and he confirmed it was true and that he did not want any mitigation presented. The district court found Petitioner understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983, and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felony - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Petitioner moved to strike the California conviction because the conviction occurred after the murder and the New York conviction because it was not supported by a

judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Petitioner and the lack of a formal judgment was the result of Petitioner's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Petitioner took the stand and related information on his background. During a break in the testimony, Petitioner suddenly stated he did not understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of Death.

Petitioner appealed to the Nevada Supreme Court. The Nevada Supreme Court affirmed Petitioner's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). Remittitur was stayed pending the filing of a petition for Writ of Certiorari to this Court on the anti-sympathy issues. The petition was denied on October 5, 1987, and remittitur issued on February 12, 1988.

On October 28, 1987, Petitioner filed his first State petition for post-conviction relief. An evidentiary hearing was held on August 25, 1988. Supplemental points and authorities were filed on October 3, 1988. The district court

entered an oral decision denying the petition on February 14, 1989. Formal findings of fact and conclusions of law were filed on July 5, 1989.[1]

The Nevada Supreme Court affirmed the district court's denial of Petitioner's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). Petitioner proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Petitioner to exhaust his state remedies on October 16, 1991.

Petitioner then filed a second State petition for post-conviction relief on December 16, 1991. The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. The district court denied the petition on July 7, 1992. Petitioner appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. Petitioner filed a petition for writ of certiorari challenging the summary affirmance and this Court denied the request on October 4, 1993.

Petitioner filed his third State petition for post-conviction relief on December 20, 2002. The State filed a motion to dismiss Petitioner's third state petition on March 4, 2001. Petitioner filed an amended third petition. On August 20, 2003, Petitioner filed his opposition to the State's motion to dismiss his third petition. The

[1] During the pendency of the first State petition, Petitioner filed his first Federal Petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003, dismissing the third State petition. Written findings were entered on October 23, 2003. Petitioner appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004.

Petitioner then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed a Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010, dismissing the Fourth State Petition as procedurally barred. A written Findings of Fact and Conclusions of Law was filed on November 6, 2010. Petitioner appealed the decision to the Nevada Supreme Court. Ultimately, the Court affirmed the district court's denial of habeas relief. This Court denied certiorari.

Petitioner filed a Petition for Writ of Habeas Corpus (Fifth Petition) on October 5, 2016, in state court. Respondent filed an opposition and motion to dismiss on November 2, 2016. Argument came before the district court on the April 19,

2017. On May 2, 2017, the district court issued a minute order denying the Fifth Petition. The Findings of Fact, Conclusions of Law and Order was filed on May 15, 2017.

On June 1, 2017, Petitioner filed a Notice of Appeal from that decision. On September 20, 2019, the Nevada Supreme Court affirmed the district court's ruling and remittitur issued on October 15, 2019. On February 11, 2020, Petitioner filed a Petition for Writ of Certiorari.

STATEMENT OF FACTS

The following factual summary was presented by the Nevada Supreme Court:

> On March 26, 1980, [Petitioner] was caught in the act of trying to defraud Sears Roebuck by seeking a refund on goods which had not been purchased. While being detained in the store's security office, [Petitioner] produced a .357 magnum pistol and made his escape, taking a security officer's badge and portable radio with him.
>
> Later that day [Petitioner] contacted the victim's wife, and told her that he was interested in purchasing a van that she and the victim had advertised for sale in the Sears parking lot. [Petitioner] was referred to the victim, a Las Vegas dentist, who made arrangements to meet him later in the day at a hotel-casino to discuss the purchase of the vehicle. When the victim, his wife and his daughter met with [Petitioner] at the hotel, [Petitioner] represented himself as a security officer employed by the hotel, openly displaying the stolen portable radio in authentication of this claim. Arrangements were made during this meeting for the victim to meet with [Petitioner] the next day, March 27, at the victim's dentistry office to test-drive the vehicle.

> On March 27, the victim's body was found in the van. The victim had been robbed and murdered.

Howard I, 102 Nev. 573-74, 729 P. 2d at 1342.

ARGUMENT

I. PETITIONER'S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.

Petitioner's request for extraordinary relief does not present a conflict between inferior courts or an important federal question. This Court should reject Petitioner's attempt to entice it into reviewing the Nevada Supreme Court's denial of Petitioner's unsupported claim that the Nevada Supreme Court should not be permitted to reweigh the aggravating and mitigating circumstances in death penalty cases on appeal.

Rule 10 of the Rules of the Supreme Court of the United States (RSCUS) precludes discretionary intervention in this matter. Certiorari is only warranted where there is a substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled. It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts §295 (2012). As explained in Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974), "[t]his Court's

review … is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, "[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

An important question of federal law is one that goes beyond whether the alleged error complained of "is undesirable, erroneous or even 'universally condemned.'" Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

Petitioner does not allege a substantial conflict or an important federal question. Instead, Petitioner complains that this Court should overrule its decision in Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), to the extent that it allows an appellate court to independently reweigh aggravating circumstances against mitigating circumstances to uphold a death sentence.

a. The State procedural bars constitute an adequate and independent state law ground precluding relief.

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a duty to consider whether postconviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court

has found that "[a]pplication of the statutory procedural default rules to postconviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. at 231, 112 P.3d at 1074. Additionally, the Nevada Supreme Court has held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

Here, remittitur issued from Petitioner's direct appeal on February 12, 1988. This means that Petitioner had until January 1, 1994, to file a timely habeas petition. Petitioner's underlying Petition was filed on October 5, 2016, over 18 years after remittitur issued and in excess of the one-year time frame. Therefore, Petitioners' claims are time barred and review by this Court should be precluded.

Even if the one-year rule did not begin to run until Petitioner's new issue was available, his claims are still time barred. Petitioner's contention is that appellate courts should be precluded from reweighing aggravating circumstances against mitigating circumstances to uphold a death sentence on appeal. Petitioner premises this contention upon Hurst v. Florida, 577 U.S. __, __, 136 S. Ct. 616 (2016). Petition 4-6. It is indisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, this claim is time barred because Petitioner failed to raise it within one year of Ring's publication. The district court judge correctly applied the one-year time bars in denying the petitions below.

Further, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as

recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). The State raised this bar in its Response and Motion to Dismiss. More than 5 years has passed since remittitur issued from Petitioner's direct appeal on February 12, 1988. Indeed, over 30 years have passed since Petitioner's direct appeal was final. As such, the State pled statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against his Fifth Petition. After such a passage of time, the State is prejudiced in its ability to answer this Petition and retry the penalty-phase. If Petitioner's fifth go around on state post-conviction review was not dismissed or denied on the procedural bars, the State would have been forced to track down witnesses who may have died or retired in order to prove a case that is more than three decades old. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in the 1983. The district court was correct in basing dismissal of the petition in part on NRS 34.800.

Moreover, claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b). The failure to raise grounds for relief at

the first opportunity is an abuse of the writ. NRS 34.810(2). Additionally, petitions that re-raise previously rejected complaints must be dismissed. Id. Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has emphasized that: "[a] court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 733 (2016) ("[A] petition ... has been filed within a reasonable time after the ... claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became available to him. Petitioner's contention is that a new penalty hearing is

required because of Hurst. Petition 8. It is indisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Petitioner's failure to raise this claim by June 24, 2003, amounts to a waiver. Petitioner could have raised their Ring complaint during the litigation of his prior petitions or could have filed an additional petition raising this contention. This claim could have been presented to the Nevada Supreme Court at any point after June 24, 2002. Petitioner's failure to do so renders his claim procedurally barred under NRS 34.810.

Certiorari should be denied because Petitioner's delay in raising these arguments amounts to an adequate and independent state law ground precluding relief. "This Court will not review a question of federal law decided by a state court if the decision is sustainable on a state law ground that is independent of the federal question and adequate to support the judgment." Lee v. Kemna, 534 U.S. 362, 375, 122 S. Ct. 877, 885 (2002); Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). This rule applies whether the state law ground is substantive or procedural. Id. The adequate state ground doctrine applies to bar federal review when the state court declines to address an inmate's federal claims because the inmate had failed to meet state procedural requirements.

b. Petitioner has failed to present an important federal question.

Petitioner argues that Hurst held the weighing determination, like the finding of an aggravating circumstance, constitutes an "element" of the offense that must be proven by the State beyond a reasonable doubt. This interpretation of Hurst is farfetched and disingenuous. It is one thing to argue for an extension of law based on existing precedent, but quite another to misrepresent the holding of a case. Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

This Court summarized its holding in Hurst in the first two paragraphs of the opinion thusly:

> A Florida jury convicted Timothy Lee Hurst of murdering his coworker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
>
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst, 577 U.S. at __, 136 S. Ct. at 619. Hurst does not cite to the reasonable doubt standard because its holding only concerns the identity of the fact finder, not the standard of proof. The holding of Hurst is founded upon the Sixth Amendment right to a jury, not the Fourteenth Amendment Due Process requirement for proof beyond

a reasonable doubt. Hurst is silent on that issue. On remand, the Florida Supreme Court interpreted Hurst as simply requiring that all critical findings necessary to imposition of the death penalty must be found by the jury, not the judge. Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) ("In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances"). After Hurst, Florida now requires all necessary findings to be made by a jury rather than a judge, but still only applies the reasonable doubt standard to the existence of the aggravating factors, not the weighing. Id.

In Petitioner's case, a jury made all necessary findings for the death penalty, including weighing, in full compliance with Hurst, which is nothing more than an application of Ring. Accordingly, Hurst does not represent an intervening change in law which requires discretionary intervention by this Court.

Many other state courts have rejected an interpretation of Hurst that would extend the beyond-a-reasonable-doubt standard to the weighing determination:

> Importantly, the [Hurst] opinion did not hold that weighing must be done beyond a reasonable doubt. Indeed Hurst says nothing at all about whether the weighing of aggravating and mitigating circumstances must be determined beyond a reasonable doubt. And Leonard

> points to no such discussion. Instead he parses the language of Hurst to infer the Court's meaning.

Leonard v. State, 73 N.E.3d 155, 169 (Ind. 2017). Evans v. State, No. 2013-DP-01877-SCT, 2017 Miss. LEXIS 249, at *78 (June 15, 2017) ("The Hurst decision did not rest upon or even address the beyond-a-reasonable-doubt standard"); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute . . . does not require . . . findings beyond a reasonable doubt . . . that the aggravating factors outweighed the mitigating factors. . . . . Nothing in Hurst . . . affects our conclusions in this regard."); People v. Jones, 3 Cal. 5th 583, 618-619, 220 Cal.Rptr.3d 618, 398 P.3d 529 (2017); Ex parte Bohannon, 222 So.3d 525, 532-533 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Petitioner's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. This Court allowed the rejection of Petitioner's argument by the California and Alabama Supreme Courts to stand. If this Court intended the overbroad view of Hurst suggested by Petitioner, certiorari would have been granted to give guidance to the lower courts.

Additionally, several federal district courts in Nevada have examined the issue in at least 6 capital cases so far and consistently held that Hurst cannot be "stretched" so far as to conclude that the reasonable doubt standard applies to the weighing process:

> Leonard's claim extends the holding in Hurst well beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing aggravating and mitigating circumstances is an "element" that must be submitted the jury.

Leonard v. Filson, D.Nev. No. 2:99-cv-0360-MMD-CWH, 2017 U.S. Dist. LEXIS 132801, at *6 (Aug. 18, 2017); see also Emil v. Filson, D.Nev. No. 3:00-cv-00654-KJD-VPC, 2017 U.S. Dist. LEXIS 175609, at *3-5 (Oct. 22, 2017) ("Emil's claim extends the holding in Hurst well beyond its cognizable bounds. Hurst does not hold, as Appellant claims, that the weighing aggravating and mitigating circumstances is an 'element' that must be submitted to the jury"; Hernandez v. Filson, D.Nev. No. 3:09-cv-00545-LRH-WGC, 2017 U.S. Dist. LEXIS 147103, at *3-6 (Sep. 11, 2017) ("Hernandez's claims extend the holding in Hurst beyond its cognizable bounds. Neither Ring nor Hurst holds that the weighing of aggravating and mitigating circumstances is an 'element' that must be submitted to the jury, or to which the reasonable doubt standard must apply").

Well before Hurst, every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating and mitigating circumstances has rejected it, reasoning that the weighing process

constitutes not a factual determination, but a complex moral judgment. See United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005). Under Petitioners' interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published almost two years ago. The fact that not one of these leading cases on the issue was even mentioned by the Court in Hurst or since been overruled belies Petitioners' assertion that Hurst addressed such an issue. Nor did this Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934 (1989); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S. Ct. 2633 (1985); see also United States v. Sampson, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that Kansas v. Carr undermines the claim that Hurst requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard). Clearly, Petitioner's interpretation of Hurst is against the great weight of authority.

Another strong reason to reject Petitioner's dubious construction of Hurst is how this Court dealt with its own precedent in Hurst. Hurst cited Walton v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047, 3055 (1990), without overruling it. Hurst, 577 U.S. at __, 136 S. Ct. at 622. This is telling because Petitioner's view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances is in direct conflict with Walton:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650, 110 S. Ct. at 3055 [emphasis added]. If this Court intended the holding Petitioner attributes to Hurst, it would have addressed this direct conflict. Indeed, where Walton conflicted with Ring, this Court squarely addressed the issue and overruled Walton in part. Ring, 536 U.S. at 609, 122 S. Ct. at 2443 ("we overrule Walton to the extent that it allows a sentencing judge … to find an aggravating circumstance necessary for imposition of the death penalty.").

In Rauf, the Delaware death penalty scheme was held unconstitutional because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity. Rauf v. State, 145 A.3d 430 (Del. 2016). While these decisions were "prompted" in part by the Hurst

decision, the analysis actually required the court "to interpret not simply the Sixth Amendment itself, but the complex body of case law interpreting it," leading to "a diversity of views on exactly why the answers to the questions are what we have found them to be." Id. Specifically, Question 4 which applies the reasonable doubt burden of proof to the weighing process, there's nothing in the Rauf opinion which cites to the Hurst case as the basis or reason for that particular decision. Id. In fact, the concurrences suggest that the beyond-a-reasonable-doubt standard applies to weighing because of historical analysis and the Delaware Constitution rather than as a direct requirement of Hurst. Id. at 481-2 (Strine, concur), 484-5 (Holland, concur).

Under Nevada law, weighing is only 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. Lisle v. State, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). But this does not mean that weighing is part of the narrowing aspect of capital punishment the same as aggravating circumstances. Id. Instead, weighing, by definition, is part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the "selection" phase of the capital sentencing process. Id. Petitioner ignores that Nevada's use of the term, "eligibility," unlike the federal courts, has historically referred to both narrowing and individualized selection. Id. A State Supreme Court's interpretation and construction of its own state statutes is binding

on all federal courts. See e.g., Ward v. Illinois, 431 U.S. 767, 772-73, 97 S. Ct. 2085, 2089 (1977); Hortonville Joint Sch. Dist. v. Hortonville Educ. Asso., 426 U.S. 482, 488, 96 S. Ct. 2308, 2312 (1976). Appellant is not at liberty to re-interpret Nevada statutes in a manner inconsistent with the Nevada Supreme Court's own interpretation.

Notably, the Apprendi line of cases expressly acknowledge that they have no effect on sentence selection. See, e.g., Cunningham v. California, 549 U.S. 270 (2007) ("Other States have chosen to permit judges genuinely 'to exercise broad discretion … within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal.") [internal citations omitted]. This is further supported by the expressly limited nature of Hurst's overruling of Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst only overrules Spaziano and Hildwin "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty," and that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 136 S. Ct. at 624. But in Spaziano, the Supreme Court also held that the Sixth Amendment right to trial by jury has no effect on sentence selection. Spaziano, 468 U.S. at 459-62. That holding from Spaziano

remains undisturbed after Hurst, and Hurst thus has no impact on the weighing process that is part of the sentence selection process in Nevada.

Petitioner's contention does not merit discretionary intervention by this Court because he fails to raise an important federal question and/or demonstrate a substantial conflict between inferior courts.

II. WERE THIS COURT TO CONSIDER PETITIONER'S CLAIMS, THERE IS STILL NO REASON TO INTERVENE BECAUSE PETITIONER'S CLAIMS ARE MERITLESS.

Even if this Court were willing to ignore its own rules and precedents in order to consider Petitioner's challenge to the Nevada Supreme Court's upholding standing precedent, there still is no reason for this Court to intervene since Petitioner's claims are meritless.

a. Hurst is Not Retroactive and Hurst is an application of Ring.

As explained supra, Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 136 S. Ct. at 621-22. The entirety of the Court's discussion in Hurst focused on applying Ring to the case before it. Id. This Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S. Ct. 2519, 2522-27 (2004). After an extensive analysis, the Court concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S. Ct. at 2526-27.

Accordingly, several other courts have concluded that Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017); Lambrix v. Secretary, 872 F.3d 1170, 1182-1183 (11th Cir.2017); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017); In re Coley, 871 F.3d 455 (6th Cir. 2017). Given the conclusion that Hurst is nothing more than an application of Ring, it necessarily follows that Hurst is not retroactive the same as Ring.

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS 649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof.").

It is important to note that this burden of proof issue is the entire point of Petitioner's argument. This conclusion, by the only Court offering any support to Petitioner's position, that his argument is fundamentally distinguishable from Hurst, should be fatal to his claim. Regardless, reliance upon the watershed rule of criminal procedure exception to the bar against retroactive application to final convictions is

problematic because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S. Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006). Petitioners' convictions were final with the remittiturs issued in 1997 and 1999 from their direct appeals. As such, neither Ring nor Hurst apply to this matter.

b. Neither appellate reweighing nor the selection decision implicate Hurst.

Either Petitioner is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on appeal of the denial of his second habeas petition violated Hurst. Both of these complaints are equally unpersuasive because the Nevada Supreme Court has rejected the view that the post-death eligibility selection decision is a factual determination.

Ring applied Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), to Arizona's death penalty scheme, which allowed a judge to determine whether a statutory aggravating circumstance existed. The Ring Court determined that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S. Ct. at 2443.

///

///

i. Appellate reweighing was appropriate

Appellate reweighing after invalidation of an aggravating circumstance is appropriate because it does not involve a factual determination. In Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), this Court found it constitutionally permissible for an appellate court to uphold a death sentence imposed by a jury upon invalidation of an aggravating factor, if the court conducts a harmless error or a reweighing analysis. Id. at 744, 110 S. Ct. at 1446. While the Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," such review was constitutionally permissible. Id. at 754, 110 S. Ct. at 1451.

The Nevada Supreme Court resolved the question left to it by this Court as follows:

> A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. If this Court cannot conclude beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance, [the Nevada Supreme Court] must vacate the death sentence and remand the matter to the district court for a new penalty hearing.

Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) (footnote omitted).

Petitioner's radical expansion of Ring and Hurst would require abandonment of Clemons. Such an outcome is contrary to the great weight of authority. Indeed, this Court has arguably already rejected Petitioner's contention. Ring itself specifically noted that it "does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." Ring, 536 U.S. at 597, footnote 4, 122 S. Ct. at 2437, footnote 4. Both Hurst and Ring noted the availability of harmless error review on remand. Hurst, 136 S. Ct. at 624; Ring, 536 U.S. at 609, footnote.7, 122 S. Ct. at 2443, footnote 7. Further, in Brown v. Sanders, 546 U.S. 212, 217, 126 S. Ct. 884, 890 (2006), this Court acknowledged the ability of courts in weighing states to engage in harmless error review or reweighing upon invalidating an aggravator. Brown applied a similar analysis to California's non-weighing death penalty scheme, determining that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Id. at 220, 126 S. Ct. at 892 (footnote omitted). The Court then determined that the invalidated aggravator "could not have 'skewed' the sentence, and no constitutional violation occurred." Id. at 223, 126 S. Ct. at 894.

The Nevada Supreme Court has relied upon Clemons to hold that reweighing in the face of an invalid aggravating circumstance was appropriate. Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000). Nevada is not alone among the states in approving of Clemons reweighing and/or harmless error review. State v. Abdullah, 158 Idaho 386, 470-71, 348 P.3d 1, 79 (2015); State v. Kirkland, 140 Ohio St. 3d 73, 86-87, 15 N.E.3d 818, 834 (2014); Gillett v. State, 148 So.3d 260, 267-69 (Miss. 2014); State v. Berger, 2014 SD 61 ¶ 31 n.8, 853 N.W.2d 45, 57 n.8 (2014); State v. Hausner, 230 Ariz. 60, 84, 280 P.3d 604, 628 (2012); State v. Sandoval, 280 Neb. 309, 357-58, 364, 788 N.W.2d 172, 214-15, 218 (2010); Billups v. State, 72 So. 3d 122, 134 (Ala. Crim. App. 2010); People v. Mungia, 44 Cal. 4th 1101, 1139, 189 P.3d 880, 907 (2008); State v. Rice, 184 S.W.3d 646, 677 (Tenn. 2006); Myers v. State, 2006 OK CR 12, ¶¶ 105-115, 133 P.3d 312, 336-37 (Okla. Crim. App. 2006); Lambert v. State, 825 N.E.2d 1261, 1263 (Ind. 2005).

Appellate reweighing or harmless error review after invalidation of an aggravating circumstance does not implicate factual findings. In Clemons, this Court determined that, "[e]ven if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." Clemons, 494 U.S. at 752, 110 S. Ct. at 1450. Harmless error analysis is repeatedly and consistently applied in appellate review,

and, while in Mississippi the jury was entrusted with the weighing determination, the appellate court was still entitled to review the verdict after invalidating a sentencing factor to determine whether it would remain the same. This holds true even after Ring.

That an appellate court merely utilizes the factual findings of a jury in conducting a reweighing or harmless error analysis fundamentally distinguishes this case from Ring and Hurst. This reality does not change merely because Clemons noted that previous precedent had not required a jury to make the factual findings necessary to impose a death sentence since nothing about appellate reweighing or harmless error analysis invades the province of the jury in determining the existence of statutory aggravators that make a defendant death eligible. A jury's factual determination of whether a defendant is death eligible is *all* Ring requires, and the jury in both these cases made that decision.

Nor is appellate reweighing or harmless error analysis suddenly taboo merely because Hurst overruled Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984). Hildwin and Spaziano are no longer good law because "they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst 136 S.Ct. at 624. While Clemons relied on those cases in part, appellate reweighing and harmless error review comports with

Ring, because the jury still finds the facts necessary to make a defendant death eligible (in Nevada, the existence of a statutory aggravator), and the appellate court does not serve to find new facts making a defendant eligible for the death penalty.

Most importantly, this Court has recently upheld its decision in Clemons. McKinney v. Arizona, __ U.S. __, 140 S. Ct. 702 (2020). In McKinney, the Ninth Circuit ruled that the Arizona Supreme Court had failed to properly consider mitigating evidence and remanded the case back to the Arizona Supreme Court. Id. at 706. On remand, the Arizona Supreme Court reweighed the aggravating and mitigating circumstances and upheld both of McKinney's death sentences. Id. This Court held that such reweighing was permitted under Clemons. Id. at 707. This Court also held that Clemons is unaffected by the decisions in Hurst and Ring. Id. at 708 ("In short, Ring and Hurst did not require jury weighing of aggravating and mitigating circumstances, and Ring and Hurst did not overrule Clemons so as to prohibit appellate reweighing of aggravating and mitigating circumstances."). Additionally, this Court ruled that Ring and Hurst do not apply retroactively on collateral review. Id.

c. The reasonable doubt standard does not apply to weighing of aggravating and mitigating circumstances by a jury in imposing the Death Penalty

The beyond-a-reasonable-doubt standard does not apply to the selection phase of a capital sentencing proceeding since it is not a factual determination. Nevada

capital penalty proceedings comply with the requirements of Apprendi, Ring and Hurst since a jury determines death eligibility using the beyond-a-reasonable-doubt standard:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

Once the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt, thereby establishing death eligibility, the question becomes one of determining the appropriate punishment. However, this second step "is not part of the narrowing aspect of the capital sentencing process. Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what [this Court] has referred to as the selection phase of the capital sentencing process." Lisle, 131 Nev. at 365-66, 351 P.3d at 732. This weighing is not a factual determination and is not subject to the beyond-a-reasonable-doubt standard. Nunnery, 127 Nev. at 772-76, 263 P.3d at 251-53. The Court reached this conclusion in the context of a Ring and Apprendi

challenge to the omission of the beyond-a-reasonable-doubt standard from Nevada's weighing instruction. Id.

Nevada has long rejected any attempts to apply a reasonable doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the reasonable doubt standard does not apply to this individualized decision by the jurors: "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. ___, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (*citing* Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934 (1989)); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S. Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond a reasonable doubt standard is permissible because the states enjoy a broad range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S. Ct. 2516, 2525 (2006) (*citing* Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S .Ct. 2320 (1988)).

"Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047 (1990). Accordingly, Hurst imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

Because Clemons reweighing comports with the requirements of Ring and because Petitioner received all the protections required by Ring, the Nevada Supreme Court did not err in affirming the district court's denial of Petitioner's Petition for Writ of Habeas Corpus. As Petitioner has provided this Court only meritless arguments, his Petition must be denied.

///

///

///

CONCLUSION

Petitioner fails to establish that the exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such, this Court should deny certiorari.

Respectfully submitted.

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

JONATHAN E. VANBOSKERCK*
Chief Deputy District Attorney
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Counsel of Record*
Counsel for Respondent