No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTIONS PRESENTED

(Capital Case)

Nevada courts instruct juries that they may *consider* imposing a death sentence only after finding at least one statutory aggravating factor beyond a reasonable doubt *and* further finding that there are no mitigating circumstances sufficient to outweigh the aggravating factor or factors. The Nevada Supreme Court held that the outweighing step was not an eligibility requirement, but rather a mechanism for the jury to retract a finding of death-eligibility.

The question presented is:

1. Did the Nevada Supreme Court violate Mr. Smith's constitutional rights by making the outweighing requirement an afterthought for the jury, used only to lessen a death sentence to life imprisonment?

LIST OF PARTIES

Petitioner Joseph Smith is an inmate at Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent William Gittere is the warden of Ely State Prison.

LIST OF RELATED PROCEEDINGS

State v. Smith, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Judgment of Conviction (March 5, 1993)

Smith v. State, Nevada Supreme Court, Case No. 24213, Opinion (September 28, 1994)

State v. Smith, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Amended Judgment of Conviction (May 7, 1996)

Smith v. State, Nevada Supreme Court, Case No. 28786, Order Denying Rehearing (March 23, 1998)

State v. Smith, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Second Amended Judgment of Conviction (May 20, 1998)

Smith v. State, Nevada Supreme Court, Case No. 37862, Order Dismissing Appeal (May 17, 2001)

Smith v. District Court, Nevada Supreme Court, Case No. 38594, Order Denying Petition (January 17, 2002)

Smith v. State, Nevada Supreme Court, Case No. 39491, Order Dismissing Appeal (August 15, 2002)

Smith v. State, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Notice of Entry of Decision and Order (April 26, 2005)

Smith v. State, Nevada Supreme Court, Case No. 45302, Order Denying Rehearing (November 29, 2006)

Smith v. State, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Notice of Entry of Decision and Order (December 24, 2008)

Smith v. State, Nevada Supreme Court, Case No. 53113, Order of Affirmance (November 17, 2010)

Smith v. E.K. McDaniel, et al., United States District Court, District of Nevada, Case No. 2:07-cv-00318-JCM-CWH, Judgment in a Civil Case (March 13, 2014)

Smith v. State, Eighth Judicial District Court, Clark County, Nevada, Case No. 91C100991, Notice of Entry of Findings of Fact, Conclusions of Law and Order (May 25, 2017)

Smith v. State, Nevada Supreme Court, Case No. 73373, Order of Affirmance (September 26, 2019)

Smith v. State, Nevada Supreme Court, Case No. 73373, Order Denying Rehearing (November 7, 2019)

Smith v. Baker, et al., Ninth Circuit Court of Appeals, Case No. 14-99003 (pending following oral argument on July 11, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes and United States Supreme Court Rule

State Cases

State Statutes

Other

PETITION FOR WRIT OF CERTIORARI

In 2016, this Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), the latest of a long line of cases expanding the types of determinations that, under the Sixth and Fourteenth Amendments, must be made by a jury and proved beyond a reasonable doubt. In the wake of these cases, and this Court's steady expansion of Sixth and Fourteenth Amendment rights, confusion has run high among state courts and many important constitutional questions remain unanswered.

For example, the Delaware Supreme Court concluded *Hurst* invalidated its state's death-penalty statute, which assigned to the judge the task of weighing aggravating and mitigating circumstances. *See Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016). And the Colorado Supreme Court agreed that the outweighing finding must be made by a jury under *Hurst*'s predecessors. *See Woldt v. People*, 64 P.3d 256, 266–67 (Colo. 2003) (en banc) (concluding that Sixth Amendment protections extend to all factual findings on which a death sentence is predicated, including that there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved).

But other state supreme courts have, in quick succession, first interpreted *Apprendi* and its progeny expansively, before abruptly reversing course. For example, in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), the Florida Supreme Court held that *Hurst* required the jury to both find the existence of aggravating factors and perform the outweighing determination. But the court retreated from that holding just last month. *See Florida v. Poole*, 2020 WL 370302, No. SC18-145

at *11 (Fla. Jan. 23, 2020); *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. Sept. 5, 2019), *reh'g denied*, No. SC18-150, 2019 WL 6769599 (Fla. Dec. 12, 2019). The Nevada Supreme Court similarly decided after *Ring* that the Sixth Amendment required the jury to determine beyond a reasonable doubt whether mitigating evidence outweighed aggravating circumstances, *see Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), then overruled *Johnson* just nine years later, in *Nunnery v. State*, 263 P.3d 235, 250–54 (Nev. 2011). The Missouri Supreme Court also decided after *Ring* that the Sixth Amendment mandated outweighing beyond a reasonable doubt, *see State v. Whitfield*, 107 S.W.3d 253, 256–62 (Mo. 2003), then reversed course sixteen years later, *State v. Wood*, 580 S.W.3d 566, 582–88 (Mo. 2019).[1]

Even this Court recently opined, in dicta, regarding whether a petitioner whose case was final before *Ring* was entitled to have a jury rather than a judge weigh aggravating and mitigating circumstances in a capital case involving Arizona's capital sentencing scheme. *McKinney v. Arizona*, 140 S. Ct. 702 (2020).[2]

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[1] Academics also debate the scope of *Hurst*'s implications. *See* Craig Trocino & Chance Meyer, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt, 70 U. Miami L. Rev. 1118, 1145 (2016) ("[I]n light of *Hurst*, the ruling in *Clemons* no longer applies to appellate review of pre-*Hurst* Florida death sentences."); Carissa Byrne Hessick, William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. Rev. 448 (2019) (noting that "the precise scope of the decision is unclear" but arguing that *Hurst* invalidates several state capital-sentencing schemes); Jeffrey Wermer, *The Jury Requirement in Death Sentencing After Hurst v. Florida*, 94 Denv. L. Rev. 385, 387 (2017) (arguing that the different ways state courts have interpreted *Hurst* "illustrate the general confusion surrounding the U.S. Supreme Court's recent capital sentencing jurisprudence").

[2] In *McKinney*, the question the Court decided was whether the state court's characterization of a proceeding as direct review or collateral in nature was determinative of the law to be applied in the petitioner's case. *McKinney*, 140 S. Ct. at 708.

However, in the instant case, the Nevada Supreme Court sought to address this question in part by interpreting the state capital sentencing statute to mean that a jury walks back a finding of death eligibility if the mitigation outweigh the statutory aggravating circumstances. *Castillo v. State*, 442 P.3d 558, 561 (Nev. 2019). Because this decision conflicts with this Court's Sixth Amendment precedent proscribing statutes requiring a jury to qualify their verdict, Mr. Smith petitions this Court for a writ of certiorari to seek review of the state court's decision.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming the denial of Mr. Smith's post-conviction petition is reported at *Smith v. State*, 2019 WL 4740551 (Nev. 2019) (unpublished table disposition). It is also reprinted in the Appendix of the Petition ("Pet. App.") at Pet. App. 2-3. The order denying rehearing is unpublished and is reprinted in the Appendix at Pet. App. 1.

JURISDICTION

The Nevada Supreme Court's order of affirmance in Mr. Smith's case was issued on September 26, 2019, and a timely petition for rehearing was denied on November 7, 2019. On January 28, 2020, Justice Kagan extended the time to file a petition for writ of certiorari until and including April 3, 2020.

This Court has statutory jurisdiction for both cases under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Nevada Revised Statutes § 175.554 provides in, pertinent part:

> 2. The jury shall determine:
>
> (a) Whether an aggravating circumstance or circumstances are found to exist;
>
> (b) Whether a mitigating circumstance or circumstances are found to exist; and
>
> (c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.
>
> 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.

Nevada Revised Statutes § 200.030 provides in, pertinent part:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

> (a) By death, 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

STATEMENT OF THE CASE

Nevada law provides that a defendant cannot be exposed to the death penalty unless a jury finds both that at least one aggravating circumstance exists and that the mitigating evidence does not outweigh the aggravating circumstance or circumstances. *See Lisle v. State,* 351 P.3d 725, 732 (Nev. 2015) (explaining that there is "a relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances."); *Middleton v. State*, 968 P.2d 296, 314–15 (Nev. 1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."); 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) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

Although the Nevada Supreme Court has repeatedly held that the weighing determination is a condition precedent to the jury's *consideration* of the death penalty, it has also concluded that if the weighing decision comes out in favor of the

defendant then the jury can qualify its decision by walking back a finding of death eligibility. *Castillo v. State*, 442 P.3d 558, 561 (Nev. 2019). As evidenced most recently in Mr. Smith's case, this position conflicts with this Court's longstanding decision in *Andres v. United States*, 333 U.S. 740 (1948).

A. Mr. Smith is sentenced to death under an uncertain burden of proof.

Mr. Smith was convicted of, among other things, first-degree murder. The court instructed the jury it could consider imposing a sentence of death "only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." The jury was never instructed that it had to find the second element of death-eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt.

In Mr. Smith's case, the jury found one aggravating circumstance: that the murder involved depravity of mind or mutilation. The jury concluded that the mitigating evidence did not outweigh the aggravating circumstance and, having done so, further determined that death was the appropriate punishment.

B. This Court issues *Hurst v. Florida*, and Smith seeks relief.

In *Hurst v. Florida*, this Court invalidated Florida's death-penalty scheme and held a jury must find beyond a reasonable doubt all conditions precedent to imposing a death sentence—not just the presence of an aggravating circumstance. 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."); *id.* at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt").

Based on *Hurst*, Mr. Smith filed a new habeas petition, arguing that *Hurst* rendered his death sentence unconstitutional because it was unconstitutional for the trial court not to instruct the jury that the prosecution must prove mitigation does not outweigh aggravation beyond a reasonable doubt.

C. The Nevada Supreme Court sidesteps the *Hurst* claim and creates new constitutional problems.

On September 26, 2019, the Nevada Supreme Court affirmed the denial of Mr. Smith's petition for writ of habeas corpus.[3] The court cited to its recent opinion in *Castillo v. State*, 442 P.3d 558 (Nev. 2019), in denying the petition.

In *Castillo*, the court first distinguished between "factual determinations" and "moral choices." 442 P.3d at 559-61. Only pure factual questions, the court held, are susceptible to proof beyond a reasonable doubt. *Id.*[4] The court then

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[3] Although the Nevada Supreme Court denied Mr. Smith's petition on the basis of procedural default, those procedural bars were intertwined with federal Sixth Amendment law. *See Smith v. State*, 2019 WL 4740551 (Nev. 2019) (holding Mr. Smith failed to overcome procedural bars because his arguments regarding *Hurst* lacked merit, citing *Castillo v. State*, 442 P.3d 558 (Nev. 2019)). Because the Nevada Supreme Court reached the merits of Smith's federal claim, this Court is not precluded from reviewing the issues presented here. *See Rippo v. Baker*, 137 S. Ct. 905, 907, fn. * (2017) (holding this Court could review the petitioner's claim because the Nevada Supreme Court did not invoke any state law grounds that were independent of the federal claim (citing *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016)).

[4] This Court in dicta previously made a similar distinction, but exclusively under the Eighth Amendment, not under the Sixth Amendment. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Under the Sixth Amendment, unlike the Eighth,

recharacterized the second step in Nevada's capital sentencing scheme, explaining that it does not render a defendant "eligible" for the death penalty, but rather walks back over the line an already-death-eligible defendant. *Id.* In reaching these conclusions, the Nevada Supreme Court deprived Mr. Smith of his right to a jury trial and of proof by the beyond a reasonable doubt of every element of the capital offense.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Nevada Supreme Court's opinion conflicts with this Court's decisions in *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *See* U.S. Sup. Ct. R. 10(c) (compelling reasons exist to grant review in cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). Moreover, this Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court," *i.e.*, to clarify its Sixth Amendment jurisprudence and bring *Andres* and *Mullaney* into its more recent Sixth Amendment analysis. *See* U.S. Sup. Ct. R. 10(c).[5]

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labels like "factual determination" and "moral determination" are meaningless; what matters is only whether the determination "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); *see Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975).

[5] This Court has not applied Sixth Amendment principles to a situation where a jury is instructed to qualify a verdict to prevent a defendant from exposure to the death penalty since it decided *Andres* in 1948.

A. This Court should clarify and consolidate its Sixth Amendment jurisprudence to bring *Andres* and *Mullaney* into the fold with *Apprendi* and its progeny.

The Nevada's Supreme Court's latest interpretation of Nevada's capital-sentencing scheme means that a jury renders a defendant death eligible after the first step but can walk back that determination of death-eligibility in the second step. This decision conflicts with this Court's jurisprudence in two cases: *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684, 684–85 (1975). When considered together, *Andres* and *Mullaney* establish that the burden remains on the State to prove each element of a capital offense beyond a reasonable doubt; the burden cannot be on the jury to qualify or undo a finding of death eligibility.

1. The Nevada Supreme Court's ruling is contrary to *Andres* and *Mullaney*, which establish that juries advance findings in rendering a verdict.

The Nevada Supreme Court's reformulation of the state's capital-sentencing law requires that the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, use the outweighing determination to "walk-back" a death-eligibility finding to a life sentence. *See Castillo*, 442 P.3d at 561. This reformulation conflicts with a line of this Court's precedent applying the Sixth Amendment and demands this Court's intervention. *See* U.S. Sup. Ct. R. 10(c) (listing, as a 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").

This Court first considered in *Andres v. United States* the interpretation of a federal statute that required a unanimous jury to "walk back" a sentence of death to a sentence of life. 333 U.S. 740 (1948). The federal death-penalty statute at the time, 18 U.S.C. § 567, allowed jurors to "qualify" a guilty verdict by adding "without capital punishment." *Andres*, 333 U.S. at 742 n.1 (quoting 18 U.S.C. § 567). If the jury did not qualify the guilty verdict, the death penalty was automatic. *Id.* This Court rejected a construction of the statute "whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* at 748–48. Instead, this Court explained, the jury must decide unanimously on guilt and then decide unanimously that death was warranted. *Id.*

This Court's holding in *Andres* is significant because it rejected the government's attempt to treat the jury's ability to qualify a verdict as a mere afterthought, or "walk-back" mechanism. To the contrary, this Court held that it was an important issue left to the jury, because "a verdict embodies in a single finding the conclusion by the jury upon all questions submitted to it." *Id.* at 884.

The Nevada Supreme Court's decision in Mr. Smith's case conflicts with *Andres*, reaching the exact opposite conclusion; instead of treating the second outweighing determination as an important issue to embody in a single verdict, the Nevada Supreme Court treats the outweighing determination as a mere afterthought for the jury. The Nevada Supreme Court has created a sentencing scheme where a jury must unanimously determine the first step of death eligibility, but can then alleviate eligibility's rigor in the next.

This new system also raises due process implications that conflict with another decision of this Court. In *Mullaney v. Wilbur*, this Court considered a Maryland statute that required a defendant to prove he acted "'in the heat of passion on sudden provocation' in order to reduce . . . homicide to manslaughter," *i.e.*, to "walk back" a homicide to manslaughter by proving an affirmative defense at sentencing. 421 U.S. 684, 684–85 (1975). This Court addressed two aspects of the Maryland statute: (1) the defendant had the burden of proving heat of passion, and (2) the statute did not require proof beyond a reasonable doubt. *Id.* at 696–701. Because the absence of heat of passion significantly increased the defendant's potential sentence, this Court concluded that both aspects of the Maryland statute violated due process. *Id.* "This is an intolerable result," this Court explained, "in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703–04.

This Court also rejected an argument that the burden should remain with the defendant "because of the difficulties in negating an argument that the homicide was committed in the heat of passion." *Id.* at 701. "No doubt this is often a heavy burden," the Court acknowledged, but "[t]he same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial." *Id.* The Constitution requires the State prove the absence of heat of passion beyond a reasonable doubt, as "this is the traditional burden which our system of criminal justice deems essential." *Id.*

In combination, *Andres* and *Mullaney* show that the construction of Nevada's capital sentencing statutes by the Nevada Supreme Court violates Mr. Smith's constitutional rights to due process and a jury verdict. The outweighing determination is a prerequisite to the jury considering a death sentence. *See Lisle*, 351 P.3d at 732. And it violates the Due Process Clause and the Eighth Amendment to make this requirement an afterthought for the jury, used only to qualify death eligibility under an uncertain burden of proof. *See Mullaney*, 421 U.S. at 703–04.

2. This Court should answer an important federal question.

This reading of *Andres* and *Mullaney* answers an important federal question: can a capital sentencing jury walk back an eligibility finding under an uncertain burden of proof? *Andres* and *Mullaney* prohibit the Nevada Supreme Court's conclusion that a jury can do so. This Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court." *See* U.S. Sup. Ct. R. 10(c).

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CONCLUSION

Because the Nevada Supreme Court's decision in Mr. Smith's case implicates important questions of federal constitutional law, the petition for a writ of certiorari should be granted and the Nevada Supreme Court's decision should be reversed.

DATED this 20th day of March, 2020.

Respectfully submitted,

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Federal Public Defender of Nevada

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Counsel for Petitioner

CASES INVOLVING SIMILAR LEGAL ISSUES

Because of the Nevada Supreme Court's incorrect interpretation of this Court's Sixth Amendment precedent, the following inmates on Nevada's death row have pending claims arguing they were sentenced based on unconstitutional jury instructions:

- *Castillo v. Nevada*, United States Supreme Court Case No. 19-7647
- *Doyle v. Nevada*, United States Supreme Court Case No. 19-7647
- *Bejarano v. Nevada*, Nevada Supreme Court Case No. 76629
- *Bollinger v. Nevada*, Nevada Supreme Court Case No. 76853
- *Chappell v. Nevada*, Nevada Supreme Court Case No. 77002
- *Emil v. Nevada*, Nevada Supreme Court Case No. 73461
- *Hernandez v. Nevada*, Nevada Supreme Court Case No. 73620
- *Howard v. Nevada*, Nevada Supreme Court Case No. 73223
- *Johnson v. Nevada*, Eighth Judicial District of Nevada Case No. A-19-789336-W
- *Leonard v. Nevada*, Nevada Supreme Court Case No. 79780
- *Maestas v. Nevada*, Eighth Judicial District of Nevada Case No. A-19-806078-W
- *Powell v. Nevada*, Nevada Supreme Court Case No. 74168
- *Thomas v. Nevada*, Nevada Supreme Court Case No. 77345
- *Walker v. Nevada*, Nevada Supreme Court Case No. 75013
- *Ybarra v. Nevada*, Nevada Supreme Court Case No. 72942

Several of these inmates were also resentenced to death by the Nevada Supreme Court acting as factfinders.

APPENDICIES

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73373

FILED

NOV 07 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).[1]

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]The Honorable Elissa Cadish, Justice, did not participate in the decision of this matter.

19-45860

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73373

FILED

SEP 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on January 9, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *Smith v. State*, 114 Nev. 33, 953 P.2d 264 (1998). The petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, appellant acknowledges that he previously sought postconviction relief. The petition was therefore successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. *See* NRS 34.810(2). Finally, because the State pleaded laches, appellant had to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars, and that a fundamental miscarriage of justice would result if his petition was not considered,

because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth a new retroactive rule that requires trial courts to instruct jurors that the State must prove that the aggravating circumstances are not outweighed by the mitigating circumstances beyond a reasonable doubt. We disagree. *See Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (same), *cert. denied*, 139 S. Ct. 415 (2018). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

Silver, J.

cc: Chief Judge, Eighth Judicial District Court
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]The Honorable Elisa F. Cadish, Justice, did not participate in the decision in this matter.