No. 19-8090

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

William Gittere, Warden, et al., Respondent.

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

**CAPITAL CASE**

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## REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mr. Smith presented one question for this Court to consider: whether the Nevada Supreme Court violated Mr. Smith's constitutional rights by making the outweighing determination an afterthought for the jury, used only to lessen a death sentence to life imprisonment.

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

### A. The State entirely ignored Mr. Smith's question presented.

In its brief in opposition, the State entirely fails to address Mr. Smith's question presented. Instead, the State recharacterizes the question as "[w]hether the Nevada Supreme Court did not violate Petitioner's rights by requiring the jury to determine whether the mitigating circumstances did not outweigh the aggravating circumstances in imposing the death penalty." BIO at i. Consequently, the State spends many pages addressing Mr. Smith's arguments on a separate issue before the Nevada Supreme Court—but entirely fails to address the arguments before *this* Court regarding the Nevada Supreme Court's unconstitutional ruling. The Nevada Supreme Court's decision conflicts with a line of this Court's Sixth Amendment precedent, *e.g.*, *Andres v. United States*, 333 U.S. 740 (1948), which

demands this Court's intervention. *See* Petition at 9-12; U.S. Sup. Ct. R. 10 (c) (listing, as compelling reason to grant review, cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). The Nevada Supreme Court's decision also raises an important federal question: whether a capital sentencing scheme can require the jury to qualify a finding of death-eligibility. *Cf.* Petition at 12; U.S. Sup. Ct. R. 10 (c) (contemplating this Court's review to "decide[] an important question of federal law that has not been, but should be, settled by this Court"). The State did not address these arguments, and this Court should grant Mr. Smith's petition for writ for certiorari to review this important federal question.

### B. The State makes only cursory and unpersuasive arguments opposing this Court's grant of certiorari.

The State recites the standard for this Court's discretionary review under U.S. Sup. Ct. R. 10. BIO at 3-4. But, in the remainder of its brief in opposition, the State fails to support its argument that the petition here does not meet that standard. Instead, the State makes several concessions that support, rather than undermine, the reasons given in the petition for this Court's review. And, to the extent that the State addresses Mr. Smith's arguments, the State relies on differences in interpretations of this Court's caselaw—reliance appropriate for merits briefing, not a brief in opposition.

The State contends that Mr. Smith incorrectly interprets this Court's decision in *Hurst v. Florida*, based on interpretations by other state and federal courts. 136

S. Ct. 616 (2016); BIO at 9–14, 15-17. Mr. Smith interprets *Hurst*, in accordance with its plain language, to require juries to make every determination necessary before increasing a potential sentence from life to death. *Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *see also id.* at 622 ("Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty."). In states like Nevada, this includes the weighing step, because Nevada requires a jury finding that mitigating evidence does not outweigh aggravating factors as a precondition before consideration of the death penalty. *See* Nev. Rev. Stat. § 175.554 (3) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found"); Nev. Rev. Stat. § 200.030 (4)(a) (death is available punishment for first-degree murder "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

The State relies on cases from other states that have held their capital-sentencing schemes are constitutional under *Hurst*. *See* BIO at 10-11 (citing cases from other jurisdictions). But those states lack the three-step capital sentencing scheme that the Nevada legislature has adopted. *See, e.g.*, *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) ("[B]ecause in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists

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

In any event, even if these states had Nevada's three-step sentencing scheme, the Delaware Supreme Court after *Hurst* invalidated the state's capital sentencing scheme "because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity." *Rauf v. State*, 145 A.3d 430 (Del. 2016). The existence of this split is a reason to grant certiorari, not deny it. *See* U.S. Sup. Ct. R. 10 (b).

The State also relies on this Court's previous treatment of this issue to support its argument that it should deny certiorari here—this Court's denial of

certiorari in *Rangel v. California*, 137 S. Ct. 623 (2017), and *Bohannon v. Alabama*, 137 S. Ct. 831 (2017), and its refusal in *Hurst* to overrule *Walton v. Arizona*, 497 U.S. 639 (1990). BIO at 10-11, 12-13. As this Court has explained, a denial of certiorari is in no way a commentary on the merits of a case and has no precedential effect. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion on the merits of the case'"). As for *Walton*, the State misleadingly conflates the Sixth Amendment and Eighth Amendment holdings. BIO at 12-13. Mr. Smith bases his arguments on the former—which this Court overruled nearly twenty years ago. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both.").

The State next argues that this Court should not grant review because, according to the State, *Hurst* is not retroactive under federal retroactivity standards. BIO at 15–17. But Mr. Smith seeks certiorari from a state court decision where the Nevada Supreme Court did not make any adverse finding that *Hurst* should not be applied retroactively. And Nevada's retroactivity rules are more relaxed than those that apply under this Court's decision in *Teague*. *See Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002). This Court should decline to consider this state law question, particularly because the Nevada Supreme Court did not deny relief based on whether *Hurst* applies retroactively. *See generally Smith v. State*, 449 P.3d 460 (Nev. 2019) (unpublished table disposition) (citing *Castillo v. State*,

442 P.3d 558 (Nev. 2019)); *see also Powell v. State*, 153 A.3d 69, 74–76 (Del. 2016) (concluding that state decision invalidating capital sentencing scheme after *Hurst* applied retroactively under state law).

The State argues that *Hurst* is a Sixth Amendment case, not a Due Process case concerning the burden of proof. BIO at 9. To be clear, Mr. Smith's question presented is based *almost entirely* on the Sixth Amendment right to a jury trial. The State also makes two important concessions. First, the State concedes that weighing, in Nevada, is a "necessary finding[] for the death penalty." BIO at 10; *see also* BIO at 13 (explaining that, in Nevada, weighing is "part of death 'eligibility' to the extent a jury is precluded from imposing death if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstances"). Second, the State concedes that the Florida Supreme Court, on remand from *Hurst v. Florida*, 136 S. Ct. 616 (2016), interpreted *Hurst* to require "that all critical findings necessary to imposition of the death penalty . . . be found by the jury, not the judge." BIO at 10 (citing *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016)).[1]

Because the State has provided no persuasive reason why this Court should decline to consider the merits of the question presented, this Court should grant

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

certiorari on this issue to decide the important federal question. *See* U.S. Sup. Ct. R. 10 (c).

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

In its brief in opposition, the State argued that Mr. Smith failed to raise a federal question because "the State procedural bars constitute an adequate and independent state law ground precluding relief." BIO at 4.

As explained in the petition, although the Nevada Supreme Court denied Mr. Smith's claim on the basis of procedural default, those procedural bars were intertwined with federal Sixth Amendment law. *See* Petition at 7, fn. 3. Because the Nevada Supreme Court's decision turned on the resolution of a federal question, the default ruling was not independent of federal law. *See id.*; *Smith*, 449 P.3d 460 (citing *Castillo*, 442 P.3d 558 (holding that Mr. Castillo failed to overcome procedural bars "[b]ecause Castillo's arguments regarding *Hurst* lack merit")). The State fails to respond to these points, which should be deemed a concession that this Court's review is not precluded here. *See* U.S. Sup. Ct. R. 15.2 ("Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.").

## CONCLUSION

The State does not meaningfully address or rebut Mr. Smith's arguments that this Court's review is warranted. 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 judgment should be reversed.

DATED this 4th day of June, 2020.

Respectfully submitted,

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