No. 19-8192

IN THE SUPREME COURT OF THE UNITED STATES

May 6, 2020

JOHN BEJARANO, *Petitioner,*

v.

WILLIAM GITTERE, Warden, *Respondent.*

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

RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

BRAD D. LEVENSON
DAVID ANTHONY
Assistant Federal Public Defenders
411 East Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Petitioner

JENNIFER P. NOBLE
Chief Deputy District Attorney
Nevada Bar #9446
Washoe County District Attorney
One South Sierra Street
Reno, Nevada 89501
(775) 337-5755

Counsel for Respondent

QUESTION PRESENTED

CAPITAL CASE

In Nevada, death eligibility attaches once the prosecution proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance. *Lisle v. State*, 131 Nev. 356, 365-366, 351 P.3d 725, 732 (2015); *Castillo v. State*, 135 Nev. Adv. Op. 16, 442 P.3d 558 (2019). Death eligibility does not depend on a jury finding beyond a reasonable doubt that mitigating circumstances do not outweigh aggravating circumstances, and no such requirement exists in Nevada. *Id.*

In Nevada, a habeas petitioner must file a post-conviction petition for a writ of habeas corpus within one year after entry of the judgment of conviction, or one year after the Supreme Court issues its remittitur, if an appeal is taken. NRS 34.726(1). An untimely or successive petition is procedurally barred and must be dismissed absent a demonstration of good cause for the delay and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). When a claim was not previously legally available to a petitioner, it may constitute good cause to excuse the procedural bar. *Rippo v. State*, 134 Nev. Adv. Op. 53, 423 P.3d 1084, 1095 (2018). Bejarano filed his fourth petition for writ of habeas corpus more almost 30 years after his conviction.

The Nevada Supreme Court found that the decision in *Hurst v. Florida,* 577 U.S. __, 136 S. Ct. 616 (2016) did not announce new law relevant to the weighing component of Nevada's death penalty procedures, and therefore, did not constitute

good cause to excuse Nevada's procedural bars for untimeliness and successiveness. Appendix A, 1-2.

1. Should this Court rule contrary to its holding in *McKinney v. Arizona*, __ U.S. __, 140 S. Ct. 702 (2020), and hold that *Clemons v. Mississippi*, 494 U.S. 738 (1990) is no longer good law?
2. Did the Nevada Supreme Court err in finding that because *Hurst* did not create new law applicable to Nevada, there was no good cause to excuse Nevada statutory procedural bars applicable to Bejarano's successive and untimely petition for writ of habeas corpus?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Constitutional Provisions

State Statutes

Rules

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STATEMENT OF THE CASE

Since his conviction in 1988, Bejarano's case has been the subject of extensive appellate and post-conviction litigation. His direct appeal was denied by the Nevada Supreme Court. *Bejarano v. State,* 106 Nev. 851, 809 P.2d 598 (1988). His subsequent three attempts to obtain post-conviction relief via petition for writ of habeas corpus were unsuccessful. *Bejarano v. State*, 106 Nev. 840, 801 P.2d 1388 (1990); *Bejarano v. Warden*, 112 Nev. 1466, 929 P.2d 922 (1996); *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006). In 2017, Bejarano filed his fourth post-conviction petition for writ of habeas corpus. The district court dismissed it as untimely. On appeal, the Nevada Supreme Court rejected Bejarano's claim that this Court's decision in *Hurst v. Florida,* 577 U.S. __, 136 S. Ct. 616 (2016) established good cause to excuse procedural bars preventing Bejarano from re-

raising his untimely, successive, and abusive petition. It rejected Bejarano's claim that *Hurst* created new law for Nevada. It rejected Bejarano's argument *Hurst* mandates a jury find that the aggravating facts outweighed any mitigating factors beyond a reasonable doubt, and prohibits appellate reweighing of jury-found aggravating and mitigating circumstances.

Bejarano's current petition for writ of certiorari seeks relief from the Nevada Supreme Court's order affirming the district court's denial of his fourth, untimely, abusive and successive post-conviction habeas corpus petition. Bejarano recognizes this Court's very recent decision in *McKinney v. Arizona*, __ U.S. __, 140 S. Ct. 702 (2020) reiterated that appellate courts may properly reweigh capital sentences when an aggravator is invalidated. In attempt to avoid the implications of the recent McKinney holding, he attempts to distinguish its application to Nevada. Petition, p. 3.

A. <u>Facts of the Case</u>

In *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006), the Nevada Supreme Court provided a succinct recitation of the facts of this case:

> On March 2, 1987, Reno taxicab driver Roland Wright was found dead, shot twice in the head at point-blank range with a sawed-off rifle and robbed of about $100 to $250. Bejarano was later arrested and charged with the following crimes: murder with the use of a deadly weapon, robbery with the use of a deadly weapon, being an ex-felon in possession of a firearm, possession and disposition of a sawed-off rifle, possession of a stolen motor vehicle, and carrying a concealed weapon. The murder count charged in pertinent part that Bejarano "did willfully, unlawfully, and with malice aforethought, deliberation, and premeditation, and during the course and commission of a robbery, kill and murder [Wright]."

Bejarano v. State, 122 Nev. 1066, 1070-1071 (2006).

In his first State court habeas petition, Bejarano argued that four of the six aggravating circumstances—committing the crime while under a sentence of imprisonment, avoiding a lawful arrest, robbery, and receiving money—were inapplicable as a matter of law or were not proved as a matter of fact. The habeas judge rejected the claim, and the Nevada Supreme Court affirmed, citing the law of the case. *Bejarano v. State*, 106 Nev. 840, 841, 801 P.2d 1388 (1990).

Later, the Nevada Supreme Court's holding in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) prohibited the use of aggravating circumstances that also serve as a predicate for felony murder. In *Bejarano v. State*, 122 Nev. 1066, *supra*, the Nevada Supreme Court invalidated two aggravators based on *McConnell*. It performed a reweighing analysis, and concluded that the absent the invalid aggravators, the jury would still have found Bejarano death eligible.

REASONS FOR DENYING THE PETITION

A. This Court Should Decline Bejarano's Invitation to Abrogate *McKinney v. State* and Overrule *Clemons v. Mississippi*.

Bejarano urges this Court to overrule *Clemons v. Mississippi*, 494 U.S. 738 (1990) as inconsistent with *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and its progeny. He argues that *Clemons* violates the Sixth Amendment right to a jury trial. This Court should decline the invitation to do so. This Court should also reject Bejarano's argument that this Court's recent decision in *McKinney v. Arizona*, __ U.S. __, 140 S. Ct. 702 (2020) should be abrogated to the extent it recognizes *Clemons* as good law.

To support his argument that *Clemons* should be overruled, in his petition for writ of certiorari, Bejarano cites *Mullaney v Wilbur*, 421 U.S. 684 (1975) and *Andres v. United States*, 333 U.S. 740 (1948). He argues that "[w]hen 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." Petition, 23. Although Bejarano briefly cited *Mullaney* in the proceedings below, he never gave the Nevada Supreme Court an opportunity to consider the implications of *Andres, supra* in conjunction with *Mullaney, supra*. Indeed, Bejarano never even cited to *Andres*. The Nevada Supreme Court never had the opportunity to accept or reject this portion of his argument.

Bejarano recognizes that this Court has had many opportunities to abrogate *Clemons*. In *McKinney supra*, this Court relied on *Clemons* and regarded it as valid precedent. It held that a *Clemons* reweighing is permissible to address error pursuant to *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869 (1982). *Clemons* was integral to the Court's analysis, and this Court expressly rejected the notion that *Clemons* was no longer good law after *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) and *Hurst v. Florida*, 577 US. __, 136 S. Ct. 616 (2016).

In *McKinney*, *supra*, this Court explained that *Ring* had nothing to do with jury sentencing, but instead merely established that the jury must find that an aggravating factor existed:

> In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court carefully avoided any suggestion that "it

> is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." *Id*., at 481, 120 S.Ct. 2348. And in the death penalty context, as Justice Scalia, joined by Justice THOMAS, explained in his concurrence in *Ring*, the decision in *Ring* "has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." 536 U.S. at 612, 122 S.Ct. 2428; *see also Kansas v. Carr*, 577 U.S. ——,136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (slip op., at 9–11). Therefore, as Justice Scalia explained, the "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 536 U.S. at 612, 122 S.Ct. 2428.
>
> 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.
>
> *McKinney*, 122 S. Ct. 702 at 708.

This Court explained further that a *Clemons* reweighing is not a sentencing proceeding, and that appellate reweighing is "akin to harmless error review." *Id*. at 709. Bejarano attempts to distinguish his case from McKinney's, arguing that "importantly, Arizona does not have a three-step capital sentencing statute." Petition, 17. He claims that because Arizona trial judges decided the existence of aggravating circumstances prior to *Ring*, *McKinney* is mere non-binding dicta for Nevada. *Id*. Bejarano's observations are perhaps distinctions, but they are not a solid foundation on which to rest a meaningful and necessary difference. The Court should decline Bejarano's invitation to abrogate *Clemons*.

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B. The Nevada Supreme Court's Decision Was Based On An Application of State Law Unaffected By *Hurst*.

1. *Hurst* Did Not Change Capital Sentencing in Nevada.

Within the second question presented lies a fundamental problem: Bejarano assumes that in Nevada, death eligibility attaches only after a jury finds that the aggravating factors outweigh the mitigating factors. But Nevada's capital scheme does not require any finding that the aggravating factors outweigh the mitigating factors, so it naturally follows that there can be no requirement that this unrequired finding be subject to the quantum of proof for which Bejarano advocates.

At one time, Nevada Supreme Court decisions were inconsistent on this subject, but this issue has long been resolved against Bejarano. *Compare McConnell v. State*, 125 Nev. 243, 254, 212 P.3d 307, 314–15 (2009) ("[N]othing in the plain language of [the relevant statutory] provisions 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;" *Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (noting that the weighing requirement is part of a factual determination that must be found by a jury beyond a reasonable doubt in accordance with *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)), *overruled by Nunnery v. State*, 127 Nev. 739, 263 P.3d 235 (2011). The Nevada Supreme Court has made clear that, "a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance." *Castillo v. State*, 135 Nev. Adv. Op. 16, 442 P.3d 558 (2019) (*citing Lisle v. State*,

131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015); *Jeremias v. State*, 412 P.3d 43, 134 Nev. __ (2018).

Nevada's approach to death eligibility, and the absence of a weighing requirement, finds sound support in United States Supreme Court jurisprudence. In *Lisle v. State*, 131 Nev. Adv. Op. 39, 351 P.3d 725 (2015), the Nevada Supreme Court relied on precedent from the United States Supreme Court to declare that death eligibility rests on the jury's finding of at least one aggravator and nothing more. *Lisle*, 351 P.3d at 731-32 ("The Court has referred to the narrowing component of the capital sentencing process as the 'eligibility' phase and the individualized-consideration component as the 'selection' phase.") (*citing Buchanan v. Angelone*, 522 U.S. 269, 275, 118 S. Ct. 757, 139 L.Ed.2d 702 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant.") (citation omitted)).

The *Lisle* Court noted that in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed. 269 (1992), the United States Supreme Court, after discussing the narrowing requirement and explaining that it was met under the Louisiana statute by the elements of the capital offense and the finding of at least one statutory aggravating factor, characterized that process as establishing "eligibility for the death penalty." *Id.* at 342.

The reasoning in *Sawyer, supra*, was recently reaffirmed by this Court in *Kansas v. Carr*, __ U.S. __ , 136 S. Ct. 633, 642 (2016):

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the *Kansas* statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.
>
> *Kansas v. Carr*, __ U.S. __, 136 S. Ct. 633, 642 (2016).

The weighing of mitigators and aggravators is not a factual exercise that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict. A defendant is eligible for a death sentence after a finding of guilt and the existence of least one aggravator. *Middleton v. State*, 114 Nev. 1089, 1117, 968 P.2d 296 (1998), *cert denied*, 538 U.S. 927, 120 S. Ct. 322 (1999). Bejarano

argues that Nevada case law has, for the most part, held that death eligibility includes the weighing of aggravators and mitigators. The Nevada Supreme Court, however, has resolved the disparity in its case law against Bejarano.

In *Nunnery v. State*, 127 Nev. 749, 263 P.3d at 250–53 (2011), this Court concluded that the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the proof-beyond-a-reasonable-doubt standard as mandated by *Apprendi* and *Ring*. The weighing process is not a factual one that must be found beyond a reasonable doubt, and, therefore, it is not part of the eligibility process that must be determined by a jury. *Burnside v. State*, 352 P.3d 627, 646, 131 Nev. Adv. Op. 40 (2015), cited by Bejarano, does not support his argument. There, the Court was confronted with the issue of whether the Court could uphold Burnside's death sentence in the absence of the prior-violent-felony aggravating circumstance. *Id*. at 650-51 ("We held in *Nunnery v. State*, ____ Nev. ___, 263 P.3d 235, 241, 250–53 (2011), that the weighing of aggravating and mitigating circumstances 'is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof' and therefore is not subject to *Apprendi* and *Ring*."). The *Burnside* Court made clear that it could affirm the defendant's death sentence because he was death eligible because of the remaining aggravator, and there were no mitigators to consider in the reweighing process.

Since the weighing of aggravators and mitigators is not, as Bejarano argues, a necessary pre-condition for death eligibility in Nevada, the weighing determination is not an element of a capital offense. *Hurst*, *Apprendi,* and *Ring* do

not apply to moral or non-factual determinations. The basic legal principle behind those decisions is the idea that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury. *Apprendi*, 530 U.S. at 494. Thus, non-factual or moral determinations do not fall within the ambit of *Hurst*.

Bejarano suggested below that *Hurst* establishes that any determination, regardless of whether it is factual, is due the full protections of the Sixth and Fourteenth Amendments. But a fair reading of *Hurst* repels Bejarano's assertion. In *Hurst*, this Court explained, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619. Because the *Hurst* Court applied *Apprendi* and *Ring*, which apply only to the necessary factual components needed to impose death, *Hurst*, itself, rejects the idea that it applies to moral and factual weighing of aggravator and mitigators.

2. Because *Hurst* Did Not Create A New, Previously Unavailable Legal Claim, the Nevada Supreme Court's Application of State Statutory Procedural Bars Was Proper.

This Court should decline review because the state court did not decide an important question of federal law in a way that conflicts with other state courts. At best, the question presented, although framed as a question of constitutional law, essentially asserts that the state court misapplied state law in finding that Bejarano was not entitled to relief. United States Supreme Court Rule 10. Bejarano is urging this Court to undertake an error-correcting function, and it should decline to do so.

The Nevada Supreme Court concluded that Bejarano's most recent petition, was untimely, having been filed well outside the statutory bar pursuant to NRS 34.726(1). That statute provides, in relevant part:

> 34.726 Limitations on time to file; stay of sentence
>
> 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 after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution 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 reviewing court further observed that because the petition raised claims that were previously litigated and resolved on their merits, and new claims that could have been raised in prior proceeding, it constituted an abuse the writ pursuant to NRS 34.810. That statute provides, in relevant part:

> 34.810. Additional reasons for dismissal of petition
>
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Here, Bejarano was convicted in 1988—nearly 30 years ago. The Nevada Supreme Court affirmed his conviction and sentence in 1988, and he pursued habeas relief in 1990, 1996, and 2003. Thus, his fourth petition is untimely,

successive, and procedurally barred absent a showing of good cause and prejudice or actual innocence. Bejarano urged the courts below to find good cause based on *Hurst*. This argument was without merit.

While *Hurst* was decided in 2016, its holding is grounded on a straightforward application of principles announced in *Ring* and *Apprendi*. *Apprendi* was decided in 2000, and *Ring* was decided in 2002. Bejarano could have thus raised his argument that the Nevada Supreme Court deprived him of his right to have a jury determine his death eligibility long before *Hurst* was decided. Since Bejarano should have raised his claim at least within one year after *Apprendi* was decided, the claim is time-barred. It is also successive as it could have been raised in the third petition. Bejarano failed to show good cause or actual innocence to overcome the procedural bars, and the district court correctly decided this issue.

CONCLUSION

The State of Nevada respectfully asserts that certiorari should be denied.

DATED this 6th day of May, 2020.

Respectfully submitted

JENNIFER P. NOBLE*
Chief Deputy District Attorney
Washoe County District Attorney's Office
One South Sierra Street
Reno, Nevada 89501
(775) 337-5755
Counsel of Record*

Counsel for Respondent