No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Robert Ybarra, Jr., Petitioner,

v.

William Gittere, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Capital Case)

Under Nevada law, a jury 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 actually an eligibility requirement, and thus not subject to the requirement that it be found beyond a reasonable doubt by a jury.

1. Did the Nevada Supreme Court violate Ybarra's constitutional rights by holding that the outweighing determination—a finding that exposed Ybarra to a greater punishment—was not a "fact" that exposed him to a greater punishment?

LIST OF PARTIES

Petitioner Robert Ybarra is a death row inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison. Respondent Aaron Ford is the Attorney General of Nevada.

LIST OF RELATED PROCEEDINGS

Ybarra v. State, Nevada Supreme Court, No. 12624 (Oct. 10, 1980).

State v. Ybarra, Seventh Judicial District Court of Nevada, No. 1511 (July 23, 1981).

Ybarra v. State, Nevada Supreme Court, No. 13590 (Mar. 28, 1984).

Ybarra v. Nevada, United States Supreme Court, No. 84-5504 (Feb. 25, 1985).

Nevada v. Ybarra, Seventh Judicial District Court of Nevada, No. 1736 (July 9, 1986).

Ybarra v. Sumner, United States District Court for Nevada, No. CV-N-87-125-ECR (Feb. 29, 1988).

Ybarra v. Sumner, First Judicial District Court of Nevada, No. 88-00350H (Dec. 30, 1988).

Ybarra v. Director, Nevada Supreme Court, No. 19705 (June 29, 1989).

Ybarra v. Godinez, United States District Court for Nevada, No. CV-N-89-529-ECR (Mar. 31, 1993).

Ybarra v. McDaniel, Seventh Judicial District Court of Nevada, No. 1736 (June 29, 1998).

Ybarra v. Warden, Nevada Supreme Court, No. 32762 (July 6, 1999).

Ybarra v. McDaniel, United States Supreme Court, No. 99-7182 (Feb. 28, 2000).

Ybarra v. State, Nevada Supreme Court, No. 43981 (Nov. 28, 2005).

Ybarra v. Filson, United States District Court for Nevada, No. 3:00-cv-00233-GMN-VPC (Oct. 31, 2006).[1]

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[1] Though judgment was entered on October 31, 2006, Ybarra later filed a motion under Fed. R. Civ. P. 60(b) raising a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), which was denied; the Ninth Circuit reversed and remanded in *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Case No. 3:00-cv-00233-GMN-VPC is still pending.

Ybarra v. McDaniel, Seventh Judicial District Court of Nevada, No. HC-0303002 (June 26, 2008).

Ybarra v. State, Nevada Supreme Court, No. 52167 (Mar. 3, 2011).

Ybarra v. McDaniel, Ninth Circuit Court of Appeals, No. 07-99019 (Sept. 6, 2011).

Ybarra v. Baker, United States Supreme Court No. 11-10652 (Oct. 9, 2012).

Ybarra v. Filson, Ninth Circuit Court of Appeals, Nos. 13-17326, 17-15793, 17-71465 (Sept. 1, 2017).

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PETITION FOR WRIT OF CERTIORARI

Nevada's death penalty statute has one feature that is "relatively unique": Nevada law "precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances." *Lisle v. State*, 351 P.3d 725, 732 (Nev. 2015). But this weighing does not determine the sentence; under Nevada law, finding that the mitigation is outweighed by the aggravation only allows death as an option. *See* Nev. Rev. Stat. § 177.554(3).

This statute, Nev. Rev. Stat. § 177.554(3), was part of the death penalty regime enacted in response to this Court's decisions in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). *See Smith v. State*, 560 P.2d 158, 159 (Nev. 1977); *see also Bishop v. State*, 597 P.2d 273 (Nev. 1979); 1977 Nev. Stat. 1541, 1544. Application of this statute has been the subject of disagreement within the Nevada Supreme Court. *See, e.g., Canape v. State*, 859 P.2d 1023, 1038 (Nev. 1993) (Springer, J., dissenting) ("I have become convinced that no one, including the members of this court, presently understands what juries are required to do in Nevada when they are asked to decide between the death penalty and life imprisonment."). But, for most of the statute's life, one aspect of the scheme was consistent: the requirement that juries consider death as an option only *after* concluding that mitigating evidence does not outweigh any statutory aggravating factors.

In *Hurst*, this Court reiterated that "each element of a crime" must "be proved to a jury beyond a reasonable doubt." *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016). An "element" in this context is "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict'" *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). The Court recognized that under the Florida statute, "The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 136 S. Ct. at 622 (modifications in original). Because these findings allowed for a greater punishment, they were subject to the *Apprendi* rule; because Florida's statute did not require the jury to find these facts beyond a reasonable doubt, the Florida statute was unconstitutional. *Hurst*, 136 S. Ct. at 624; *see also In re Winship*, 397 U.S. 358 (1970).

In response to *Hurst*, the Nevada Supreme Court has re-written the statute. Now, though increasing the possible penalty and a prerequisite to death-eligibility, "the weighing of aggravating and mitigating circumstances is not part of death-eligibility under our statutory scheme." *Castillo v. State*, 442 P.3d 558, 561 (Nev. 2019). This parsing, however, does not excuse Nevada's statute from the requirements of *Hurst*, and thus, this Court should grant a writ of certiorari to determine this important question of federal law.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming denial of Ybarra's post-conviction petition is unpublished and is found at Appendix A.[2] The order denying rehearing is unpublished and is found at Appendix B.

JURISDICTION

The Nevada Supreme Court's order of affirmance in Ybarra's case was issued on September 13, 2019, and a timely petition for rehearing was denied on November 7, 2019. On January 29, 2020, Justice Kagan extended the time within which Ybarra may file this petition for writ of certiorari to April 3, 2020.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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[2] It may also be found online. *Ybarra v. Filson*, No. 72942, 2019 WL 4447242 (Nev. Sept. 13, 2019).

Nev. Rev. Stat. § 175.554(3) provides: "The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

Nev. Rev. Stat. § 200.030 provides in relevant part:

> 4. 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 . . . ; or
> >
> > (b) By imprisonment in the state prison:
> >
> > > (1) For life without the possibility of parole;
> > >
> > > (2) For life with the possibility of parole, . . . ; or
> > >
> > > (3) For a definite term of 50 years . . . .
>
> A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

STATEMENT OF THE CASE

For almost thirty-five years, Nevada law was unambiguous that two findings were required before a defendant became eligible for a death sentence, a finding that at least one aggravating circumstance existed and a finding that there were no mitigating circumstances sufficient to outweigh the aggravation. *See, e.g., Ybarra v. State*, 679 P.2d 797, 802 (Nev. 1984); 711 P.2d 856, 862, (Nev. 1985); *Bennett v. State*, 901 P.2d 676, 683 (Nev. 1995); *Williams v. State*, 945 P.2d 438, 447 n.8 (Nev. 1997); *Middleton v. State*, 968 P.2d 296, 314–15 (Nev. 1998); *Holloway v. State*, 6

P.3d 987, 996 (Nev. 2000); *Servin v. State*, 32 P.3d 1277, 1285 (Nev. 2001); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), *overruled on other grounds by Nunnery v. State*, 263 P.3d 235 (Nev. 2011); *McConnell v. State*, 107 P.3d 1287, 1292 (Nev. 2005).

In *Hurst v. Florida*, following a long line of precedent, this Court made clear that any finding that increases the possible sentence is a finding that must be proved beyond a reasonable doubt to a jury. 136 S. Ct. at 622. This role for the jury—and the proof beyond a reasonable doubt requirement—cannot be supplanted by a judicial factfinder. *Id. Hurst* made clear this applied, as well, to a finding that the aggravating circumstances outweighed the mitigating circumstances. *Id.*

In this case, Ybarra's jury was not instructed that it needed to find beyond a reasonable doubt that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances. Thus, in imposing a death sentence, the jury never made this finding beyond a reasonable doubt. This violates *Hurst*.

Based on *Hurst*, Ybarra filed a petition for writ of habeas corpus before the Seventh Judicial District Court of Nevada, 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. The district court denied this petition.

Ybarra appealed to the Nevada Supreme Court. While Ybarra's case was pending, the Nevada Supreme Court issued a decision in *Castillo v. State*, 442 P.3d 558 (Nev. 2019). There the Nevada Supreme Court held that the weighing

determination was not a "fact" under the *Apprendi* line of cases, and that even if it were, the weighing determination is not an eligibility factor under Nevada's death penalty. *Id.* at 560–61.[3]

Shortly after, and relying on *Castillo*, the Nevada Supreme Court denied Ybarra's appeal. App. A.[4] Ybarra sought rehearing, which the Nevada Supreme Court denied. App. B.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari because the Nevada Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, the Nevada Supreme Court has created a means to sidestep the requirements of *Hurst* and the *Apprendi* line of cases: by creating a distinction between findings of "fact" and other kinds of findings that increase the possible penalty. This distinction is nowhere found in *Hurst* or its progenitors.

Indeed, this Court's precedents eschew such a distinction. As this Court indicated in *Apprendi*, the Court has "dismissed the possibility that a State could

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[3] Though the groundwork for *Castillo* came from prior decisions of the Nevada Supreme Court, the *Castillo* decision went farther than any prior decision in avoiding the requirements of *Apprendi*, *Ring*, and then *Hurst*. *See Lisle*, 351 P.3d at 732 (for purposes of the miscarriage of justice exception to state procedural default, the outweighing determination was part of the "selection" phase); *see also Jeremias v. State*, 412 P.3d 43, 54 (Nev. 2018) (discussing eligibility under Eighth Amendment jurisprudence but not Sixth Amendment jurisprudence).

[4] Although the Nevada Supreme Court denied Ybarra's petition on the basis of procedural default, those procedural defaults were intertwined with the Sixth Amendment analysis, and thus were not independent. *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.* (2017).

circumvent the protections of *Winship* by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt." (emphasis added)).

In this regard, the "relatively unique" aspect of Nevada's death sentencing regime is important: in Nevada weighing does not determine the sentence, but the sentencing options. For example, in Ohio, a more traditional "weighing" state, the jury is commanded to recommend a sentence based on the weighing determination. *Compare* Ohio Rev. Cod. Ann. § 2929.03(D)(2) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury *shall* recommend to the court that the sentence of death be imposed on the offender) *with* Nev. Rev. Stat. § 177.554(3).[5] Thus, Nevada's statute is not like the statute at issue in *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), in which the weighing of mitigating factors is synonymous with selecting a penalty. *See* Kan. Stat. Ann. § 21-6617(e) (if aggravating circumstances not outweighed by mitigating

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[5] *See generally* Sarah Gerwig-Moore, *Remedial Reading: Evaluating Federal Courts' Application of the Prejudice Standard in Capital Sentences from "Weighing" and "Non-Weighing" States*, 20:2 J. of Const. L. Online 1, 7–8 (Jan. 2018) (describing history of "weighing" and "non-weighing" states).

circumstances, "the defendant *shall* be sentenced to death"). In Nevada, weighing dictates the options, not the decision.

Because of this distinction, the Nevada Supreme Court's re-labeling of its own law—law that had been in effect for more than thirty years and re-written only to avoid this Court's holding in *Hurst*—presents an important question of federal law. Namely: can the states avoid the effect of *Apprendi*, *Ring*, and *Hurst*, by determining that some findings that increase a potential sentence are not "facts"? This cannot be so, and this Court must grant this petition to prevent the erosion of *Apprendi* and its progeny. *See, e.g.*, *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").[6]

The importance of this federal question is exemplified by a comparison to *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Andres*, this Court addressed two alternate interpretations of the old federal death penalty statute, under which juries could qualify their guilt verdict by

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[6] Notably, a number of states already require the jury to perform its "outweighing" analysis beyond a reasonable doubt. *See, e.g.*, Ark. Code § 5-4-603; N.C.P.I.-CRIM. 150.10; Tenn. Code § 39-13-204(f)(2); Utah Code Ann. § 76-3-207(5)(b); *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990). Until recently, Missouri also imposed such a requirement.

adding "without capital punishment." *Andres*, 333 U.S. at 746. The government urged that, under the statute, the jury had to first be unanimous in its guilt verdict, and then be unanimous in adding the notation. *Id.* Under this interpretation, if the jury agreed about guilt, but disagreed about sentence, the defendant would be sentenced to death. The defense urged that the statute required "unanimity in respect to both guilt and punishment before a verdict can be returned." *Id.* Under this interpretation, if the jury agreed about guilt, but disagreed about sentence, the defendant would not be sentenced to death.

This Court, noting the Sixth Amendment's unanimity requirements, adopted the defense's interpretation. The Court explained, "In criminal cases this requirement of unanimity extends to all issues—character or degree of crime, guilty and punishment—which are left to the jury." The jury's verdict addresses these issues: "A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Id.* at 748. Important here, this Court specifically rejected the idea that sentencing discretion "permits a procedure whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* The Nevada Supreme Court's new interpretation of Nevada's statute—whereby a jury must first find a defendant eligible for death, but then "alleviate" the rigor of that eligibility—runs afoul of *Andres*.

Mullaney v. Wilbur, 421 U.S. 684, is similarly instructive. There, this Court recognized that criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Id.* at 697–98. To that end,

the State still had to prove every element beyond a reasonable doubt, even the "absence of the heat of passion on sudden provocation." *Id.* at 704. And, like *Andres*, this Court recognized that "[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant . . . ." *Id.* at 698. *Mullaney* went further, noting that the proof beyond a reasonable doubt requirement could not be avoided with changed labels:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 698. The Nevada Supreme Court has done precisely this. By redefining the elements that constitute capital murder, by characterizing the weighing determination as a factor, the Nevada Supreme Court has undermined the interests that *Winship* sought to protect. This elevation of form over substance—prohibited by *Mullaney*, *Apprendi*, and *Ring*—raises an important federal question, and this Court should grant Ybarra's petition for writ of certiorari.

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CONCLUSION

Based on the foregoing, Ybarra respectfully requests that this Court grant certiorari.

DATED this 31st day of March, 2020.

Respectfully submitted,

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APPENDICES

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY STATE PRISON; AND ADAM P. LAXALT, NEVADA ATTORNEY GENERAL,
Respondents.

No. 72942

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Appellant filed his petition on January 11, 2017, more than thirty years after the remittitur issued on appeal from the judgment of conviction. *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984). 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). 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 new retroactive rules that: (1) require 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, and (2) prohibit the reweighing of aggravating and mitigating circumstances when an aggravating circumstance is stricken by a reviewing court. We disagree. *See Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the arguments that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures or to appellate reweighing); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures), *cert. denied*, 139 S. Ct. 415 (2018).

Appellant also argues that the jury was not adequately instructed regarding the "depravity of mind" aggravating circumstance. This claim is waived as it could have been raised in a prior proceeding, and appellant does not explain why he has good cause to raise it now. *See* NRS 34.810(1)(b). To the extent he argues that the error renders him actually innocent, we disagree. *See Mitchell v. State*, 122 Nev. 1269, 1273–74, 149

P.3d 33, 36 (2006) ("Actual innocence means factual innocence, not mere legal insufficiency." (internal quotation marks and alterations omitted)).

Having concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY STATE PRISON; AND ADAM P. LAXALT, NEVADA ATTORNEY GENERAL,
Respondents.

No. 72942

FILED
NOV 07 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk

19-45857