No. 19-8239

IN THE

Supreme Court of the United States

ROBERT YBARRA, JR.,

Petitioners,

v.

WILLIAM GIETTERE, WARDEN, *et al.*,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL A. WHEABLE
District Attorney
BRYAN PYLE
Deputy District Attorney
White Pine County
District Attorney
801 Clark St.
Ely, NV 89301
(775)293-6565
BPyle@whitpinecountynv.gov

AARON FORD
Attorney General of Nevada
HEATHER D. PROCTER*
Chief Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
HProcter@ag.nv.gov
* *Counsel of Record*

Counsel for Respondents

QUESTION PRESENTED

(Capital Case)

Whether the Nevada Supreme Court violated Petitioner's rights by dismissing, on state procedural grounds, his claim that this Court's precedents require the jury to apply a beyond-a-reasonable-doubt standard when conducting the weighing component of capital sentencing under Nev. Rev. Stat. 200.030(4).

PARTIES

Robert Ybarra, Jr., is the Petitioner and an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison. Aaron D. Ford, the Attorney General of the State of Nevada, is a Respondent not named in the caption, and he joins this brief in full.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION 3

I. Any Federal Question Is Barred By Adequate And Independent State Grounds 4
II. Any Federal Question Is Barred By *Teague* 6
III. Ybarra's Claim Is Plainly Without Merit. 7
A. The Nevada Supreme Court's reading of Nevada law is consistent with decades of this Court's precedents addressing criminal sentencing. 7
B. This Court recently rejected Ybarra's reading of *Hurst*. 9
C. Because Ybarra's claim fails under *Hurst*, the petition really only presents a question of state law. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma,
470 U.S. 68 (1985) 4

Apprendi v. New Jersey,
530 U.S. 466 (2000) 6, 7, 8, 9

Beard v. Kindler,
558 U.S. 53 (2009) 5

Boyde v. California,
494 U.S. 370 (1990) 8

Castillo v. State,
442 P.3d 558 (Nev. 2019) 9, 10

Cunningham v. California,
549 U.S. 270 (2007) 8

Eddings v. Oklahoma,
455 U.S. 104 (1982) 8

Gregg v. Georgia,
428 U.S. 153 (1976) 7

Harris v. Reed,
489 U.S. 255, 260 (1989) 4

Hildwin v. Florida,
490 U.S. 638 (1988) 9

Hurst v. Florida,
136 S. Ct. 616 (2016) 3, 9

Jeremias v. State,
412 P.3d 43 (Nev. 2018) 9, 10

Kansas v. Carr,
136 S. Ct. 633 (2016) 8, 10

Lisle v. State,
351 P.3d 725 (Nev. 2015) 9, 10

Lowenfield v. Phelps,
484 U.S. 231 (1988) 7

McKinney v. Arizona,
140 S. Ct. 702 (2020) 1, 6, 7, 9

Nunnery v. State,
163 P.3d 235 (Nev. 2011) 9, 10

Penry v. Lynaugh,
492 U.S. 302 (1989) 8

Ring v. Arizona,
536 U.S. 584 (2002) 6, 8

Rippo v. Baker,
137 S. Ct. 905 (2017) 4

Schriro v. Summerlin,
542 U.S. 348 (2004) 6

Spaziano v. Florida,
468 U.S. 447 (1984) 9

Teague v. Lane,
489 U.S. 288 (1989) 1, 3, 6

Walton v. Arizona,
497 U.S. 539 (1990) 8

Ybarra v. Filson,
869 F.3d 1016 (9th Cir. 2017) 6

Ybarra v. Nevada,
470 U.S. 1009 (1985) 3, 6

Ybarra v. State,
679 P.2d 797 (Nev. 1984). 1, 2, 3

Statutes

Nev. Rev. Stat. 34.726 4

Nev. Rev. Stat. 34.810(2) 4

Rules

See Sup. Ct. R. 10 3

INTRODUCTION

Petitioner Robert Ybarra, Jr. (hereinafter "Ybarra"), seeks review of an issue that, boiled to its core, is a question of state statutory interpretation. But even assuming Ybarra presents a proper federal question, his claim is barred by adequate and independent grounds for denial of relief under state law and *Teague v. Lane*, 489 U.S. 288 (1989), and the Nevada Supreme Court's interpretation of Nevada's capital sentencing scheme is consistent with this Court's capital sentencing jurisprudence, including this Court's most recent statement on the issue in *McKinney v. Arizona*, 140 S. Ct. 702 (2020). This Court should deny the petition.

STATEMENT OF THE CASE

Ybarra was sentenced to death in 1981 for burning sixteen-year-old Nancy Griffith to death. *Ybarra v. State*, 679 P.2d 797, 798-800 (Nev. 1984).

On September 29, 1979, two men who were on their way to go fishing outside the eastern Nevada town of Ely discovered Griffith, who was still alive, lying on the side of a dirt road. *Id* at 798. They covered her with their shirts and returned to town to get the sheriff. *Id*. at 799. Although the deputy that returned with the two men knew Griffith, her body was so badly burned and battered that he did not recognize her. *Id.* Before being transferred to a Salt Lake City Hospital, where she died the following day, Griffith was able to communicate "that she had been raped by a man in a red truck who worked north of where she was found." *Id*.

The day before, Griffith and a girlfriend met Ybarra—an oil worker that worked a rig located north of where Griffith was discovered—and rode around town with him in a red truck. *Ybarra*, 679 P.2d at 799. When Griffith's friend decided to go home, the girls made plans to meet-up again later in the evening, but Griffith never showed up. *Id*.

Investigators that searched the area "discovered a quarter-mile trail of charred human skin and [Griffith's] burnt clothing leading to where her body was found." *Id*. They also found evidence of a struggle; a burn area; a gas can that had Ybarra's fingerprints on it; and boot prints and tire tracks matching Ybarra's boots and truck tires. *Id*. And a search of Ybarra's mobile home turned up a beer can with Griffith's fingerprints. *Id*.

An autopsy conducted the day Griffith died "revealed that she had been party to sexual intercourse within the previous two or three days and she had suffered trauma to the genital area and a severe blow to the head." *Id*. The burns that caused Griffith's death "seared her respiratory passages and charred eighty percent of her body surface." *Id*. Burn patterns on Griffith's body were consistent with fire "fueled by a flammable liquid which was ignited when she was either standing or sitting." *Id*.

A jury found Ybarra guilty of first-degree murder, first-degree kidnapping, battery with the intent to commit sexual assault, and sexual assault. *Id*. The jury imposed three sentences of life without the possibility of parole for the kidnaping, battery, and sexual assault convictions, which the district court ordered to be served

consecutively. *Id*. And "the jury found four aggravating circumstances and no mitigating circumstances sufficient to outweigh them," resulting in a sentence of death on the murder conviction. *Ybarra*, 679 P.2d at 799-800.

Ybarra appealed and the Nevada Supreme Court affirmed. *Id.* at 803. This Court denied certiorari over the dissent of Justices Brennan and Marshall *Ybarra v. Nevada*, 470 U.S. 1009 (1985).

After more than three decades of litigation, Ybarra filed a state post-conviction petition that included a claim asserting that *Hurst v. Florida*, 136 S. Ct. 616 (2016), compelled reversal of his sentence because the jury was not required to apply a beyond a reasonable doubt standard when weighing the mitigating circumstances against the aggravating factors. Pet. App. 001. The Nevada Supreme Court affirmed denial of the petition on state procedural grounds. Pet. App. 001-02. Ybarra now seeks review of that decision.

REASONS FOR DENYING THE PETITION

As the last point in this brief shows, because this Court's opinions squarely undermine Ybarra's understanding of this Court's jurisprudence on capital sentencing—this Court rejected the reading of *Hurst* that Ybarra advances here just a few months ago—the petition presents nothing more than a question of state law that is not reviewable by this Court. But even assuming the petition presents a federal question, it is barred by adequate and independent grounds for denial of relief and principles of retroactivity from *Teague*. As a result, Ybarra fails to identify a federal question that warrants this Court's review. *See* Sup. Ct. R. 10.

I. Any Federal Question Is Barred By Adequate And Independent State Grounds

The Nevada Supreme Court affirmed the denial of Ybarra's post-conviction petition, noting that Ybarra's petition was untimely under Nev. Rev. Stat. 34.726, and his new claim based on *Hurst* constituted an abuse of the writ under Nev. Rev. Stat. 34.810(2). Pet. App. 001-02. As a result, Ybarra's claim based on *Hurst* is barred based on adequate and independent state grounds for denial of relief. *See*, *e.g.*, *Harris v. Reed*, 489 U.S. 255, 260 (1989).

In a footnote, Ybarra wrongly relies upon this Court's decision in *Rippo v. Baker*, 137 S. Ct. 905 (2017), to suggest that the "procedural defaults were intertwined with Sixth Amendment analysis, and thus were not independent." Pet. at 6 n.4. A procedural bar is dependent on federal law when the decision to apply the bar is *preceded* by the resolution of a question of federal law. *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (finding state procedural rule dependent on federal law because "[b]efore applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question").

In *Rippo*, the Nevada Supreme Court acknowledged that it had previously denied Rippo's federal claim and relied on that prior merits ruling in defaulting the claim when Rippo tried to present it a second time. 137 S. Ct. at 907 n.*. Thus, *Rippo* involved the resolution of a federal claim that *preceded* application of the bar.

That is not the case here. The determination that Ybarra's petition was untimely did not involve the prior resolution of a question of federal law. Pet. App. 001. And the determination that his claim under *Hurst* was an abuse of the writ did

not involve the prior resolution of a question of federal law. Pet. App. 001. Those two decisions are questions of state law that are completely independent of the resolution of any federal question.

Additionally, Ybarra's argument that the Nevada Supreme Court intertwined its application of the bar with Sixth Amendment analysis misses the mark. The Nevada Supreme Court did not engage in a Sixth Amendment analysis; it merely addressed whether Ybarra's reliance on this Court's decision in *Hurst* would satisfy the state standard for cause to excuse Ybarra's procedural defaults. Pet. App. 002. The Nevada Supreme Court concluded that *Hurst* did not establish cause for the state procedural defaults. Pet. App. 002. Whether a petitioner can meet the state standard for cause is just that: the application of a standard of state law. And even assuming it is intertwined with issues of federal law, whether a petitioner can establish cause for a procedural default does not precede the application of the state procedural bar. As the Nevada Supreme Court's order in this case demonstrates, the exceptions to Nevada's procedural bars are only analyzed after the state court has already determined that the state bar applies. Pet. App. 002.[1]

The Nevada Supreme Court's denial of relief on state procedural grounds compels denial of the petition.

[1] To conclude otherwise would likely create the undesirable result of states adopting mandatory default rules without exceptions. *Cf. Beard v. Kindler*, 558 U.S. 53, 61 (2009) (discussing the likelihood of states adopting mandatory procedural bars if discretionary bars would be deemed inadequate).

II. Any Federal Question Is Barred By *Teague*

This Court denied Ybarra's petition for writ of certiorari in 1985, following his unsuccessful direct appeal to the Nevada Supreme Court. *Ybarra*, 470 U.S. at 1009. Because Ybarra's conviction was final on direct review more than thirty years before this Court decided *Hurst*, he must show that *Hurst* established a new rule that is retroactive to cases on collateral review. *Teague*, 489 U.S. at 311.

In *Teague*, this Court set out two exceptions to the general rule that this Court's decisions do not apply retroactively to cases that are already final on direct review. *Id*. Substantive rules generally apply retroactively, while only watershed procedural rules apply retroactively. *Id.*; *see also Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Ybarra's claim based on *Hurst* does not meet either of *Teague*'s exceptions.

The issue is any easy one in this case. Ybarra's claim finds its roots in the rule this Court set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and extended to the capital-sentencing context in *Ring v. Arizona*, 536 U.S. 584 (2002). But in *Summerlin*, this Court already determined that the principles established in those cases do not apply retroactively under *Teague*. 542 U.S. at 353-58. And it reaffirmed this point while rejecting an argument for retroactivity of *Hurst* this term in *McKinney*, 140 S. Ct. at 708.

As a result, the claim Ybarra presents is barred under *Teague*.[2]

III. Ybarra's Claim Is Plainly Without Merit.

Ybarra asserts that his sentence violates principles traceable to this Court's decision in *Apprendi*. Pet. at 2. His claim is plainly without merit. This Court, for decades, has recognized that weighing of aggravating and mitigating circumstances is a moral determination that fits squarely within the realm of sentence selection, an issue not subject to the Sixth Amendment right to trial by jury under *Apprendi*. And it reaffirmed this point just a few months ago in *McKinney*. Accordingly, the Nevada Supreme Court's understanding of Nevada sentencing law is in accord with this Court's long-standing precedents on the issue.

A. The Nevada Supreme Court's reading of Nevada law is consistent with decades of this Court's precedents addressing criminal sentencing.

For decades, this Court's jurisprudence on capital sentencing has recognized two components of capital sentencing: sentence eligibility and sentence selection. It is beyond dispute that some mechanism must exist to narrow the class of persons *eligible* for a capital sentence. *Gregg v. Georgia*, 428 U.S. 153 (1976). States can satisfy that requirement by narrowly defining capital offenses or by requiring the existence of a narrowly defined aggravating circumstance. *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988). Additionally, it is beyond dispute that a defendant facing a capital sentence is entitled to an individualized sentencing determination where the

---

[2] In a separate proceeding filed under 28 U.S.C. § 2254, the Ninth Circuit also determined that *Teague* bars Ybarra's *Hurst* claim. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017).

sentencer—whether judge or jury—has the discretion to consider mitigating evidence the defendant offers when selecting the appropriate punishment. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Until this Court overruled *Walton v. Arizona*, 497 U.S. 539 (1990), in *Ring*, this Court's precedent permitted both components of capital sentencing to be conducted by a judge rather than a jury. *Ring*, 536 U.S. at 608. However, in *Ring*, this Court extended the decision from *Apprendi* to capital sentencing by concluding that any aggravating circumstance necessary to make a defendant eligible for a capital sentence must be proven to a jury beyond a reasonable doubt. *Id.*

However, the *Apprendi* line of cases, including *Ring*, did not displace this Court's long-standing recognition that weighing aggravating circumstances against any mitigating evidence involves an "exercise of discretion and moral judgment" that fits within the realm of sentence selection. *See*, *e.g.*, *Boyde v. California*, 494 U.S. 370, 376-77 (1990); *see also Kansas v. Carr*, 136 S. Ct. 633, 642 (2016); *Cunningham v. California*, 549 U.S. 270, 294 (2007) (acknowledging universal agreement that leaving the judge with broad discretion to select appropriate sentence from a range of punishments "encounters no Sixth Amendment shoal"); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (noting that the imposition of sentence "should reflect a reasoned *moral* response") (emphasis in original).

This point is confirmed by a close review of *Hurst*. *Hurst* did nothing more than apply *Ring* to Florida's capital sentencing framework where the jury made an advisory decision on sentencing but a judge made the ultimate determination on the

existence of aggravating circumstances and selected the appropriate sentence. *Hurst*, 136 S. Ct. at 621-24. While *Hurst* does overrule two of this Court's prior decisions regarding Florida's sentencing scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1988)—this Court only *partially* overruled those cases, limiting its holding to concluding that a judge may not find the aggravating circumstances that make a defendant eligible for a capital sentence. *Hurst*, 136 S. Ct. at 624. As a result, other aspects of the holding from those cases survived *Hurst*, including *Spaziano*'s recognition of the distinction between sentence eligibility and sentence selection. *Spaziano*, 468 U.S. at 457-65 (rejecting a challenge to judge selecting the appropriate sentence under the Sixth Amendment).

And the Nevada Supreme Court's understanding of Nevada's capital sentencing scheme is consistent with this point. *Castillo v. State*, 442 P.3d 558, 559-61 (Nev. 2019), *cert. denied* __ S. Ct. __, No. 19-7647, 2020 WL 1906635 (Apr. 20, 2020); *Jeremias v.* State, 412 P.3d 43, 53-54 (Nev. 2018); *Lisle v. State*, 351 P.3d 725, 730-34 (Nev. 2015); *Nunnery v. State*, 163 P.3d 235, 250-54 (Nev. 2011).

B. This Court recently rejected Ybarra's reading of *Hurst*.

Notwithstanding the foregoing, Ybarra insists that under *Hurst* the weighing determination is a matter of sentence eligibility that triggers application of the *Apprendi* line of cases in Nevada. Pet. at 6-7. But in *McKinney*, this Court rejected the assertion that *Hurst* brought the weighing determination of a state capital sentencing scheme within the scope of the rule this Court established in *Apprendi*. *McKinney*, 140 S. Ct. at 707-08. There, this Court made clear that *Apprendi*

"carefully avoided any suggestion" that its holding reached the discretionary function of selecting the appropriate sentence from within a range of available punishments. *Id*. at 707. And the Nevada Supreme Court has consistently recognized the function of the weighing determination is sentence selection, not eligibility. *Castillo*, 442 P.3d at 560-61; *Jeremias*, 412 P.3d at 54; *Lisle*, 351 P.3d at 731-32; *Nunnery*, 263 P.3d at 252-54.

C. Because Ybarra's claim fails under *Hurst*, the petition really only presents a question of state law.

Ybarra cites law from other states that impose a requirement that the jury apply a beyond-a-reasonable-doubt standard when weighing aggravating and mitigating circumstances. Pet. at 7. But that does nothing to establish that the Sixth Amendment requires such a result. As is established above, this Court's precedents are plainly to the contrary. And it is well established that the protections of the Constitution of the United States establish a floor, while states are free to provide whatever additional protection they deem necessary. *Carr*, 136 S. Ct. at 648.

The Nevada Supreme Court has consistently interpreted its own sentencing scheme in a way that rejects the underlying premise of Ybarra's claim. *Castillo*, 442 P.3d at 560-61; *Jeremias*, 412 P.3d at 54; *Lisle*, 351 P.3d at 731-32; *Nunnery*, 263 P.3d at 252-54. And because this Court's decisions do not require a contrary interpretation of Nevada law, the way the Nevada Supreme Court has resolved the issue is a question of state law upon which the Nevada Supreme Court is the ultimate expositor. As a result, when the issue presented in the petition is boiled to its core,

it presents this Court with nothing more than a question of state law that is not subject to federal review.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

/S/ HEATHER D. PROCTER

MICHAEL A. WHEABLE
District Attorney
BRYAN PYLE
Deputy District Attorney
White Pine County
District Attorney
801 Clark St.
Ely, NV 89301
(775)293-6565
BPyle@whitpinecountynv.gov

AARON FORD
Attorney General of Nevada
HEATHER D. PROCTER*
Chief Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
HProcter@ag.nv.gov
* *Counsel of Record*

Counsel for Respondents