No. 19-8239

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Robert Ybarra, Jr., Petitioner,

v.

William Gittere, et al., Respondents.

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

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For more than three decades, Nevada law unambiguously required two eligibility findings before death became a sentencing option.[1] *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016), recognizes "each element of a crime" must be "proved to a jury beyond a reasonable doubt." An "element" is "any fact that 'expose[s] the defendant to a greater punishment . . . .'" *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). To avoid this requirement, the Nevada Supreme Court re-wrote state law, removing one of the eligibility findings and instead characterizing it as part of the selection of sentence. The Nevada Supreme Court may not re-write state law to avoid constitutional requirements. This Court should grant Ybarra's petition for writ of certiorari.

A. The finding that mitigating circumstances are not outweighed by aggravating circumstances is a prerequisite to consideration of the death penalty under Nevada law; under federal law, this finding must be made beyond a reasonable doubt.

Nevada's death penalty statute is "relatively unique" in that 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

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[1] *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).

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 point remained mostly uncontroversial for the first thirty-five years of its life.[2]

In *Hurst*, this Court again explained 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 applies to a finding that the aggravating circumstances outweigh mitigating circumstances. *Id.*

Ybarra's jury was not so instructed, thus his conviction is unconstitutional. However, in response to *Hurst*, the Nevada Supreme Court has re-written Nevada's statute. *See Castillo v. State*, 442 P.3d 558, 561 (Nev. 2019) ("the weighing of aggravating and mitigating circumstances is not part of death-eligibility under our statutory scheme."). This was wrong. This Court's precedent is critical of the idea that a state court may label findings with a new name and avoid the *Apprendi* line of cases. *See Apprendi*, 530 U.S. 466, 485 (2000); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002). This is consonant with this Court's other precedent, which the State entirely fails to address. *See Andres v. United States*, 333 U.S. 740, 748 (1948) (holding unconstitutional any procedure "whereby a unanimous jury must

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[2] *See* n.1 above; *but see Canape v. State*, 859 P.2d 1023, 1038 (Nev. 1993) (Springer, J., dissenting) (noting that Nevada Supreme court "has been unable to provide any clear and consistent guides to judges, juries, prosecutors or defense counsel as to the correct procedure for juries to follow in the death-sentencing process . . . .").

first find guilt and then a unanimous jury alleviate its rigor"); *see also Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) (noting requirements of proof beyond a reasonable doubt may not be avoided by redefining or re-characterizing elements). *Andres*, in particular, reflects an important federal question this Court should consider. *See* Pet. for Writ of Certiorari at 8–9.

The State claims these arguments are meritless because "the *Apprendi* line of cases, including *Ring* [*v. Arizona*, 536 U.S. 584 (2002)], did not displace this Court's long-standing recognition that weighing aggravating circumstances against any mitigating evidence involves an 'exercise in discretion and moral judgment' that fits within the realm of sentence selection." Br. in Opp. at 8. Though that point may be valid for States in which weighing is the selection decision, the legislature of Nevada went a different route. Under the statute, and most of that statute's life, weighing is not part of the moral judgment, it is part of determining eligibility. Nev. Rev. Stat. § 175.554(3). Thus, reference to this Court's jurisprudence about other states' law is unhelpful. *See* Br. in Opp. at 8 (citing *Boyde v. California*, 494 U.S. 370, 376–77 (1990); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016); *Cunningham v. California*, 549 U.S. 270, 294 (2007); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Both California and Kansas *require* factfinders to impose death if they find the aggravating circumstances outweigh the mitigating circumstances. *See* Cal. Penal Code § 190.3 ("the trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."); Kan. Stat. Ann. § 21-6617(e) (if aggravating circumstances not

outweighed by mitigating circumstances, "the defendant *shall* be sentenced to death.").[3]

The State fails to address this distinction between Nevada law and the law of other states. The State does so, ostensibly, based on a fiction: that Nevada's capital scheme only began in 2011, when the Nevada Supreme Court began to lay the foundation for its later decision that outweighing is part of selecting a sentence. *See* Br. in Opp. at 9, 10. The State does not address the plethora of published decisions noting, over and over, that outweighing is part of the eligibility determination.

Nor does *McKinney v. Arizona*, 140 S. Ct. 702 (2020), decide this issue. *See* Br. in Opp. at 9–10. The State argues that, 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*." Br. in Opp. at 9 (citing *McKinney*, 140 S. Ct. at 707–08). But *McKinney* made no such ruling. Rather, *McKinney* rejected the argument that *Ring* and *Hurst* prohibited appellate reweighing of aggravating and mitigating circumstances. *See McKinney*, 140 S. Ct. at 707. In so holding, *McKinney* emphasized that juries must still make any initial finding that determines the sentencing range. *Id.* at 707–08 (noting that so long as the jury has made findings requisite to establishing the

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[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989), a case construing Texas law, is particularly unhelpful because Texas is not a weighing state. *See* Tex. Code Crim. Proc. art. 37.071 § 2(e)(1).

range of possible sentence, "States that leave the ultimate life-or-death decision to the judge may continue to do so." (quoting *Ring*, 536 U.S. at 612)).

Thus, where *McKinney* indicates that "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range," it is not referring to a "relatively unique" jurisdiction, like Nevada, in which weighing is an eligibility finding. *McKinney*, 140 S. Ct. at 707; *see also Lisle*, 351 P.3d at 732. Indeed, in the sentencing scheme at issue in *McKinney*, the defendant is eligible for a death sentence upon a showing that there is at least one aggravating circumstance. *See* Ariz. Rev. Stat. § 13-752(D). Only then may the jury move on to the "penalty phase," in which "the trial of fact shall . . . determine whether the death penalty should be imposed."[1] *Id.* So the issue presented by Nevada's statutory scheme—defining the weighing of aggravating and mitigating circumstances as part of determining eligibility for a greater sentence—was not presented in *McKinney*.

Finally, the State is wrong to argue that this is a question of state law. *See* Br. in Opp. at 10. Under both of the Nevada Supreme Court's readings of Nev. Rev. Stat. § 175.554(3), the determination that mitigating circumstances do not outweigh

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[1] Though the Arizona statute does not explicitly refer to "weighing," it is, in effect, like other weighing states where the jury first finds death eligibility by finding at least one aggravating circumstance, and then determines whether to impose a death sentence by reviewing aggravating and mitigating circumstances. *See* Ariz. Rev. Stat. § 13-752(D)–(H).

aggravating circumstances is a determination that increases the eligible sentence. *See Castillo v. State*, 442 P.3d 558, 561 (Nev. 2019) (acknowledging "the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances"); *see also Ybarra v. State*, 679 P.2d 797, 802 (1984) ("The sentencing authority must then determine whether the mitigating factors outweigh the aggravating factors; if they do not, the death penalty may not be imposed."). Because, regardless of the label, Nevada law treats this as an eligibility factor, it must be proven beyond a reasonable doubt to a jury.

B. The state bar was not independent of a question of federal law.

Though the Nevada Supreme Court applied a state bar to deny Mr. Ybarra's *Hurst* claim, the application of that bar was not independent of federal law. In discussing whether Ybarra overcame the procedural default, the Nevada Supreme Court stated simply, "We disagree" and cited to two cases discussing the merits of the federal claim. *See* App. A at 2 (citing *Castillo v. State*, 442 P.3d 558 (2019) and *Jeremias v. State*, 412 P.3d 43, 53–55 (Nev. 2018)). In *Jeremias*, the Nevada Supreme Court rejected the argument that, based on *Hurst*, "where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt." *Jeremias*, 412 P.3d at 53. Reviewing *Ring*, *Apprendi*, and other decisions of this Court, the Nevada Supreme Court disagreed "with [appellant Jeremias's] interpretation of *Hurst*." *Id.* *Jeremias*, a direct appeal, decided the *Hurst* issue on its merits. Thus, in this case,

the Nevada Supreme Court's citation to *Jeremias* reflects its rejection of Mr. Ybarra's claim on the merits, albeit in the context of whether Mr. Ybarra could overcome procedural default.

Indeed, this is essentially what the Nevada Supreme Court did in the other cited case, *Castillo*. *See* 442 P.3d at 559–61. The court summarized its *Hurst* holdings from *Jeremias*. *Id.* at 559. Relying on its "close reading of *Hurst*," the court noted it disagreed with Castillo's argument that "*Hurst* establishes that whenever a State conditions death-eligibility on the weighing of aggravating and mitigating circumstances, the outcome of that weighing is a fact subject to the burden of proof beyond a reasonable doubt." *Id.* Looking to *Apprendi* and *Ring*, the court also evaluated Castillo's argument that "regardless of whether the jury is being asked to make a factual finding, a moral determination, or something else altogether, if its decision makes a defendant death-eligible, it is an element of the capital offense . . . ." *Id.* Looking to *Hurst*, the court rejected this argument. *Id.* Based on this analysis, the Nevada Supreme Court concluded that "Castillo fails to demonstrate that *Hurst* announced a new rule relevant to the weighing component of Nevada's death penalty statute." *Id.* It was this analysis the Nevada Supreme Court referred to in denying Mr. Ybarra's appeal. *See* App. A at 2. Though channeled through procedural default, the Nevada Supreme Court only applied the default because it concluded Mr. Ybarra's federal claim was meritless, as it had in *Castillo* and *Jeremias*.

C. *Teague* retroactivity, a federal habeas doctrine, does not apply to this state habeas appeal; assuming it does, *Hurst* is retroactive.

Under the "*Teague* rule" for retroactivity, in federal collateral review, "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that are not subject to its general retroactivity bar." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (referring to *Teague v. Lane*, 489 U.S. 288 (1989)). There are two exceptions, however, for "new substantive rules of constitutional law" and for "watershed rules of criminal procedure." *Id.*; *see also Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (discussing substance of the "*Teague* rule"). But, until recently, *Teague* was a doctrine governing federal habeas law, specific to federal courts considering retroactive application in federal collateral review. *See Montgomery*, 136 S. Ct. at 729 ("*Teague* originated in a federal, not state, habeas proceeding . . . ."); *see also Danforth*, 552 U.S. at 278 ("*Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute."); *id.* at 281 ("Our subsequent cases, which characterize the *Teague* rule as a standard limiting only the scope of *federal* habeas relief, confirm that *Teague* speaks only to the context of federal habeas.").

Indeed, until *Montgomery*, in 2016, this Court had even left "open the question whether *Teague*'s two exceptions are binding on States as a matter of constitutional law." *Montgomery*, 136 S. Ct. at 729. In *Montgomery*, this Court held that state courts must, as a matter of federal constitutional law, apply

substantive rules in collateral proceedings. *Id.* at 732.[5] As far as counsel is aware, this Court has not applied the *Teague* rule where this Court reviews state post-conviction proceedings.

Nor should it. Though *Montgomery* establishes a floor of retroactivity, *Danforth* is clear that state courts have discretion to fashion rules of retroactivity that allow for broader protections than the federal doctrine of retroactivity. *Danforth*, 552 U.S. at 282. Thus, state rules of retroactivity are more akin to procedural default, and so, rather than ask whether this Court has the authority to retroactively apply its own law, this Court should ask whether an adequate and independent state bar supports the state court judgment. As discussed above, the Nevada Supreme Court considered the federal question presented here. *See* Argument § B. Thus, this Court is presented with a federal question relating to *Hurst*, not a question of retroactivity under state law.[6]

However, even if this Court applies the federal retroactivity doctrine to this state post-conviction proceeding, *Hurst* is retroactive. Specifically, in *Ivan V. v. City of N.Y.*, 407 U.S. 203 (1972) and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), this Court applied the proof beyond a reasonable doubt standard retroactively. Both

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[5] The Court did not address whether state postconviction courts would have to apply watershed rules of procedure retroactively. *Montgomery*, 136 S. Ct. at 729.

[6] Notably, Nevada is a jurisdiction that affords greater retroactivity than federal law. *See Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002).

cases reflect that application of the beyond a reasonable doubt standard is a watershed rule of criminal procedure because the standard is fundamental to fact finding. *See Ivan V.*, 407 U.S. at 204; *Hankerson*, 432 U.S. at 242.[7]

CONCLUSION

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

DATED this 4th day of June, 2020.

Respectfully submitted,

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[7] Additionally, because the beyond a reasonable doubt standard lessens the "risk that a defendant . . . faces a punishment that the law cannot impose upon him," *Montgomery*, 136 S. Ct. at 734, *Hurst* announced a new rule.