No. _____

IN THE

Supreme Court of the United States

RODNEY EMIL,

Petitioner,

v.

BRIAN E. WILLIAMS, SR., WARDEN, ET AL.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Nevada courts instruct juries that they 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 an eligibility requirement, but rather a mechanism for the jury to retract a finding of death eligibility. By eliminating the second fact-finding step from the legislatively proscribed death-eligibility process, this holding conflicts with this Court's rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Furman v. Georgia*, 408 U.S. 238 (1972); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Andres v. United States*, 333 U.S. 740 (1948); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The questions presented are:

1. Is Nevada's capital sentencing procedure unconstitutional after *Hurst v. Florida*, 136 S. Ct. 616 (2016), because it requires the jury—as a prerequisite to choosing a life or a death sentence—to find that mitigating circumstances do not outweigh the statutory aggravating circumstances, but does not require that finding to be made beyond a reasonable doubt?

2. Does the Nevada Supreme Court's unforeseeable expansion of the narrow and precise statutory language defining death eligibility violate *Furman v. Georgia*, and render Nevada's capital sentencing statute unconstitutionally vague?

3. Did the Nevada Supreme Court violate petitioner's constitutional rights by making the outweighing requirement incidental to the jury's verdict, used only to reduce a death sentence to life imprisonment?

LIST OF PARTIES

Petitioner Rodney Emil is a death row inmate presently being held at High Desert State Prison in Nevada. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent Brian E. Williams is the warden of High Desert State Prison. Respondent Karen Mishler is the Deputy District Attorney.

LIST OF RELATED PROCEEDINGS

United States District Court, District of Nevada (Reno)

Emil v. Gittere, Case No. 3:00-CV-0654-KJD-CBC, Order (Sept. 27, 2019)

Emil v. Hatcher, Case No. CV-S-91-882-LDG, Order Dismissing Without Prejudice Petition for Writ of Habeas Corpus (Dec. 30, 1992)

Supreme Court of the State of Nevada

Emil v. State, Case No. 73461, Order Denying Rehearing (Dec. 6, 2019)

Emil v. State, Case No. 73461, Order of Affirmance (Sept. 13, 2019)

Emil v. State, Case No. 65627, Order of Affirmance (Apr. 22, 2016)

Emil v. State, Case No. 51474, Order Denying Rehearing (Nov. 17, 2010)

Emil v. State, Case No. 51474, Order of Affirmance (July 20, 2010)

Emil v. State, Case No. 28463, Order Dismissing Appeal (62 P.3d 1154 (Nev. 2000))

Emil v. State, Case No. 21663, Order Dismissing Appeal (June 27, 1991)

Emil v. State, Case No. 19431, Opinion (784 P.2d 956 (Nev. 1989) (Per Curiam))

District Court, Clark County, Nevada

Emil v. State, Case No. 88C082176, Findings of Fact, Conclusion of Law, and Order (June 5, 2017)

State v. Emil, Case No. 88C082176, Findings of Fact, Conclusions of Law, and Order (Apr. 8, 2014)

State v. Emil, Case No. C82176, Findings of Fact, Conclusions of Law, and Order (Mar. 20, 2008)

State v. Emil, Case No. C82176, Order Denying Petition for Post-Conviction Relief (Sept. 12, 1995)

State v. Emil, Case No. C82176, Order Denying Motion for a New Trial (Aug. 23, 1990)

State v. Emil, Case No. C82176, Judgment of Conviction (June 14, 1988)

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PETITION FOR WRIT OF CERTIORARI

In 2016, this Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), which built on a long line of cases expanding the types of determinations that, under the Sixth and Fourteenth Amendments, must be made by a jury and proved beyond a reasonable doubt. In the wake of these cases, and this Court's steady expansion of Sixth and Fourteenth Amendment rights, confusion has run high among state courts, and many important constitutional questions remain unanswered.

For example, the Delaware Supreme Court concluded *Hurst* invalidated its state's death-penalty statute because it did not require the jury to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. *See Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016). And the Colorado Supreme Court agreed that the outweighing finding must be made by a jury under *Hurst*'s predecessors. *See Woldt v. People*, 64 P.3d 256, 266–67 (Colo. 2003) (en banc) (concluding that Sixth Amendment protections extend to all factual findings on which a death sentence is predicated, including that there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved).

But other state supreme courts have, in quick succession, first interpreted *Apprendi* and its progeny expansively, before abruptly reversing course. For example, in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), the Florida Supreme Court initially held that *Hurst* required the jury to both find the existence of aggravating factors and perform the outweighing determination. But the court subsequently retreated from that holding. *See Florida v. Poole*, 2020 WL 370302, No. SC18-245 at *11 (Fla. Jan. 23, 2020); *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla.

2019), *reh'g denied*, No. SC18-150, 2019 WL 6769599 (Fla. Dec. 12, 2019). The Nevada Supreme Court similarly decided after *Ring* that the Sixth Amendment required the jury to determine beyond a reasonable doubt whether mitigating evidence outweighed aggravating circumstances, *see Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), then overruled *Johnson* just nine years later, in *Nunnery v. State*, 263 P.3d 235, 250–54 (Nev. 2011). The Missouri Supreme Court also decided after *Ring* that the Sixth Amendment mandated outweighing beyond a reasonable doubt, *see State v. Whitfield*, 107 S.W.3d 253, 256–62 (Mo. 2003), then reversed course sixteen years later, *State v. Wood*, 580 S.W.3d 566, 582–88 (Mo. 2019).[1]

Overall, in the four years since *Hurst*, the state courts of every active death penalty state whose capital sentencing scheme involves judicial fact-finding have now ruled on whether the Sixth Amendment reserves such findings for the jury. This issue has therefore percolated sufficiently among the state courts to warrant this Court's review.

In recent terms, this Court has recognized that its Sixth Amendment jurisprudence remains unsettled. For example, this Court recently considered how to apply Sixth Amendment requirements to the realm of federal supervised relief. *See United States v. Haymond*, 139 S. Ct. 2369 (2019). And last month, this Court

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[1] Academics also debate the scope of *Hurst*'s implications. *See* Carissa Byrne Hessick, William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. Rev. 448 (2019) (noting that "the precise scope of the decision is unclear" but arguing that *Hurst* invalidates several state capital-sentencing schemes); Jeffrey Wermer, *The Jury Requirement in Death Sentencing After* Hurst v. Florida, 94 Denv. L. Rev. 385, 387 (2017) (arguing that the different ways state courts have interpreted *Hurst* "illustrate the general confusion surrounding the U.S. Supreme Court's recent capital sentencing jurisprudence").

issued its opinion in *Ramos v. Louisiana* to address whether the Fourteenth Amendment fully incorporates the Sixth Amendment's guarantee of a unanimous jury verdict. *See Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545 (U.S. Apr. 20, 2020).

Recently, in *McKinney v. Arizona*, in the context of Arizona's capital sentencing statute,[2] this Court held that "a jury (as opposed to a judge) is not constitutionally required to weigh aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." 140 S. Ct. 702, 707 (2020). *McKinney* instructs that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances," *id.* at 708, but *McKinney*'s holding does not provide clarity to states like Nevada[3] whose capital sentencing scheme specifically contemplates such weighing by a jury as a pre-requisite to finding a defendant *eligible* for the death penalty.

[2] Arizona's capital sentencing statute is different from Nevada's because it does not require the jury to find that no mitigating factor outweighs the aggravating factors before they can consider whether a defendant is *eligible* for the death penalty. *See* Ariz. Rev. Stat. § 13-751(E) ("The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.").

[3] At the time this Court decided *Hurst*, nine states, including Nevada and Florida, had this "relatively unique" capital sentencing scheme. *See* Ark. Code § 5-4-603; Colo. Rev. Stat. § 18-1.3-1201; Fla. Stat. § 921.141; Miss. Code § 99-19-101; Mo. Ann. Stat. § 565.030; N.C. Rev. Stat. § 15A-2000; Nev. Rev. Stat. §§ 175.554(3), 200.030(4); Tenn. Code § 39-13-204; Utah Code § 76-3-207. Four of these states require the jury to make the antecedent "weighing" determination beyond a reasonable doubt. *See* Ark. Code § 5-4-603; N.C.P.I.-CRIM. 150.10; Tenn. Code § 39-13-204; Utah Code § 76-3-207; *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990). Missouri required this determination to be made beyond a reasonable doubt until 2019, when it abrogated *Whitfield*, 107 S.W.3d 253. *See Wood*, 580 S.W.3d at 582–88.

This Court should grant this Petition for Writ of Certiorari to settle the important questions of federal law it raises and provide critical guidance to state courts with capital sentencing schemes like Nevada's.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming the denial of Emil's post-conviction petition, is unpublished and reprinted in the Appendix of the Petition ("Pet. App.") at Pet. App. 02. The order denying rehearing is unpublished and is reprinted in the Appendix at Pet. App. 01.

JURISDICTION

The Nevada Supreme Court's order of affirmance in Emil's case was issued on September 13, 2019, and a timely petition for rehearing was denied on December 6, 2019. On February 25, 2020, Justice Kagan extended the time to file a petition for writ of certiorari until and including May 4, 2020.

The 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 pertinent 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 pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Nevada Revised Statutes § 175.554 provides in, pertinent part:

> 2. The jury shall determine:
>
> a) Whether an aggravating circumstance or circumstances are found to exist;
>
> b) Whether a mitigating circumstance or circumstances are found to exist; and
>
> c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.
>
> 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.

Nevada Revised Statutes § 200.030 provides in, pertinent part:

> 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[.]

STATEMENT OF THE CASE

Nevada law provides that a defendant cannot be exposed to the death penalty unless a jury finds both that at least one aggravating circumstance exists and that the mitigating evidence does not outweigh the aggravating circumstance or

circumstances. *See Lisle v. State,* 351 P.3d 725, 732 (Nev. 2015) (explaining that there is "a relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances"); *Middleton v. State*, 968 P.2d 296, 314–15 (Nev. 1998) ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible."); 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) (permitting imposition of death penalty only if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances").

Although the Nevada Supreme Court has repeatedly held that the weighing determination is a condition precedent to the jury's *consideration* of the death penalty, it has also concluded that the weighing determination is not subject to proof beyond a reasonable doubt. As evidenced most recently in Emil's case, this position conflicts with this Court's *Apprendi* line of cases.

A. Emil is sentenced to death under an uncertain burden of proof.

Petitioner Emil was convicted of first-degree murder with use of a deadly weapon. Before selecting the death penalty for Emil, the jury concluded that two aggravating circumstances were present, and that the mitigating circumstances did not outweigh these two statutory aggravating circumstances. The court instructed

the jury it could consider imposing a sentence of death "only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." Pet. App. 44. Emil's jury was never instructed that it had to find the second element of death eligibility, that the mitigating circumstances were not outweighed by the aggravating circumstances, beyond a reasonable doubt. Pet. App. 44.

B. This Court issues *Hurst v. Florida*, and Emil seeks relief.

In *Hurst v. Florida*, this Court invalidated Florida's death-penalty scheme and held a jury must find beyond a reasonable doubt all conditions precedent to imposing a death sentence—not just the presence of an aggravating circumstance. 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt").

Based on *Hurst*, Emil filed a new habeas petition, 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. Pet. App. 20 -22.

C. The Nevada Supreme Court sidesteps the *Hurst* claims and creates new constitutional problems.

On September 13, 2019, the Nevada Supreme Court affirmed the denial of Emil's petition for writ of habeas corpus, summarily rejecting Emil's argument and

citing to its decisions in *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019) and *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43, *cert. denied*, 139 S. Ct. 415 (2018).

In *Castillo*, the court first distinguished between "factual determinations" and "moral choices." *Castillo*, 442 P. 3d at 561. Only pure factual questions, the court held, are susceptible to proof beyond a reasonable doubt. *Id.* at 560.[4] The court then recharacterized the second step in Nevada's capital sentencing scheme, explaining that it does not render a defendant "eligible" for the death penalty, but rather walks back over the line an already-death-eligible defendant—i.e., it "guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed." *Id.* at 561.

REASONS FOR GRANTING THE WRIT

Nevada's capital sentencing scheme is unconstitutional after *Hurst* because it does not require the State to prove each death-eligibility requirement beyond a reasonable doubt. Nevada has an uncommon three-step process, with two separate eligibility requirements that must be fulfilled before a death sentence is an option for the jury. It is this relatively unique structure that makes Nevada's death-penalty scheme unconstitutional even if those of other jurisdictions are not. This Court should take this opportunity to clarify its Sixth Amendment jurisprudence after *Hurst* and *McKinney*.

[4] This Court in dicta previously made a similar distinction, but exclusively under the Eighth Amendment, not under the Sixth Amendment. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Under the Sixth Amendment, unlike the Eighth, labels like "factual determination" and "moral determination" are meaningless; what matters is only whether the determination "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); *see Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975).

This Court should also grant certiorari because the Nevada Supreme Court's recent rewriting of the plain language of the capital sentencing statute violates *Furman v. Georgia*, 408 U.S. 238 (1972), and creates a host of other constitutional issues, including the arbitrary imposition of the death penalty in Nevada.

Finally, this Court should grant certiorari because the Nevada Supreme Court's reasoning conflicts with this Court's decisions in *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *See* U.S. Sup. Ct. R. 10(c) (compelling reasons exist to grant review in cases where a state court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). Moreover, this Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court," *i.e.*, to clarify its Sixth Amendment jurisprudence and bring *Andres* and *Mullaney* into its more recent Sixth Amendment analysis. *See* U.S. Sup. Ct. R. 10(c).[5]

A. This Court should resolve the important constitutional issue of whether *Hurst* invalidates Nevada's capital sentencing scheme because it does not require a jury to find beyond a reasonable doubt a fact necessary to impose the death penalty.

1. Nevada's capital sentencing scheme mandates that a jury weigh aggravating and mitigating circumstances as a pre-requisite to considering the death penalty.

Nevada's statutory death penalty scheme differs in structure from that of most other states. Nevada has an uncommon three-step process, with two separate eligibility requirements that must be fulfilled before a death sentence is an option

[5] This Court has not applied Sixth Amendment principles to a situation where a jury is instructed to qualify a verdict to prevent a defendant from exposure to the death penalty since it decided *Andres* in 1948.

for the jury. It is this relatively unique structure that makes Nevada's death penalty scheme unconstitutional after *Hurst*.

Before being able to consider whether to impose the death penalty, juries in Nevada must make two separate determinations: the jury is required to find the existence of "at least one aggravating circumstance," and it must further "find" whether any "mitigating circumstances [are] sufficient to outweigh the aggravating circumstance or circumstances found." Nev. Rev. Stat. § 175.554(3). Only if both requirements are met is a defendant exposed to the death penalty as a sentencing option at step three, where the jury for the first time can consider non-statutory aggravation and other matter evidence relating to the individual characteristics of the defendant. *See id.*; *see also* Nev. Rev. Stat. §§ 175.552(3); 200.030(4)(a) (allowing death penalty "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"); *Middleton*, 968 P.2d at 314–15 ("If an enumerated aggravator or aggravators are found, the jury must find that any mitigators do not outweigh the aggravators before a defendant is death eligible.").

Although the Nevada Supreme Court has attempted to reclassify the second step as a "selection" determination, *see Castillo*, 442 P.3d at 560–61 & n.1; *Lisle*, 351 P.3d at 732, it does so by elevating form over effect, focusing almost entirely on the semantic differences between facts and non-facts, and between eligibility and selection. *See Lisle*, 351 P.3d at 735 (Cherry & Saitta, JJ., dissenting) (accusing the majority of engaging in "semantic gymnastics in order to conclude that Nevada's

death penalty scheme is something other than what the statutes plainly make it"). This Court has consistently held that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494; *see United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (explaining that a State cannot avoid the Sixth Amendment by labeling the process "a judicial sentencing enhancement" (citation and internal quotation marks omitted)); *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 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."); *Mullaney*, 421 U.S. at 699 (rejecting semantic distinction between elements of crime and sentencing factors, and explaining that this Court's precedent "is concerned with substance rather than this kind of formalism").

The effect of Nevada's "relatively unique" three-step capital-sentencing scheme is to make the weighing determination a prerequisite to increasing the potential sentence from life imprisonment to death, as it "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*, 351 P.3d at 732. Because of its "relatively unique" three-step structure, Nevada's death sentencing scheme—in contrast to the more typical two-step schemes used in most other jurisdictions—makes the state's weighing process not the typical

"determination of *the sentence itself*," but rather a preliminary, requisite "finding of fact in support of a particular sentence." *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (emphasis in original).

2. Nevada's capital sentencing scheme only requires the first of two death-eligibility determinations to be found beyond a reasonable doubt.

During the penalty phase of Emil's criminal proceedings, in accordance with Nev. Rev. Stat. § 175.554(4),[6] the trial court instructed the jury that the State had to prove the existence of each aggravating factor beyond a reasonable doubt. (Pet. App. 44 (Jury Instruction No. 7 ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt. . . .")).) This instruction did not, however, require the State to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the enumerated statutory aggravating circumstances. (*Id.* (". . . and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.").)

3. But *Hurst* requires all eligibility findings to be made by a jury beyond a reasonable doubt.

Hurst makes clear that the Sixth Amendment, coupled with the Due Process Clause, requires a jury to find beyond a reasonable doubt not just the presence of an aggravating circumstance, but all conditions precedent to the imposition of a death

[6] "The verdict must designate the aggravating circumstance or circumstances which were found beyond a reasonable doubt, and must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." Nev. Rev. Stat. § 175.554(4).

sentence itself—"each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.

Nevada's statutory scheme is structured almost identically to the three-step Florida statute that *Hurst* held unconstitutional. Like Nevada's statutory decision-making process, Florida's unconstitutional statute required, as a prerequisite to choosing between a life and a death sentence, "'[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances," yet also did not require that "fact[]" to be "proved to a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 622, 621 (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013)).

Nevada's process is unconstitutional *not* because a weighing determination must always, in all jurisdictions, be conducted under a beyond-a-reasonable-doubt standard. Rather, it is unconstitutional because the Nevada legislature chose to make the weighing determination a *prerequisite* to the jury's ultimate consideration of a death sentence. *Hurst* and the line of cases that gave rise to it make all such prerequisites—because they make possible an increased punishment—"elements," which are necessarily subject to proof beyond a reasonable doubt.

This Court should exercise its power to "decide[] an important question of federal law that has not been, but should be, settled by this Court," to give guidance to other states with capital punishment schemes like Nevada's, which mandate a weighing process *before* a defendant can be found death eligible. *See* U.S. Sup. Ct. R. 10(c).

B. The Nevada Supreme Court's unforeseeable expansion of the narrow and precise statutory language defining death eligibility violates *Furman v. Georgia* and renders the statute unconstitutionally vague.

In recent cases, including Emil's, the Nevada Supreme Court has sidestepped the *Hurst* problem by rewriting the plain language of the capital sentencing statute, recharacterizing the second step in Nevada's capital sentencing scheme as one of selection, rather than eligibility. *See, e.g.*, *Castillo v. State*, 442 P. 3d 558 (2019); *Jeremias v. State*, 412 P.3d 43, *reh'g denied* (Apr. 27, 2018), *cert. denied*, 139 S. Ct. 415 (2018); *Lisle v. State*, 351 P.3d 725 (2015). This retreat from the plain language of the statute has created a slew of other constitutional issues, including the arbitrary imposition of the death penalty in Nevada. This unforeseeable transformation of the statute conflicts with this Court's Eighth and Fourteenth Amendment jurisprudence.

The death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it w[ill] be inflicted in an arbitrary and capricious manner," in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). This risk is "alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Id*. at 192. Nevada Revised Statutes § 175.554 provides guidance that the Nevada legislature deems particularly relevant to the sentencing decision in death penalty cases like Emil's. The Nevada Supreme Court cannot arbitrarily rewrite that capital

sentencing scheme. Indeed, "[t]he deference we owe to the decisions of the state legislatures under our federal system . . .is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg*, 428 U.S. at 176 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958) (internal citations omitted)). By eliminating "outweighing" as a precondition to death eligibility, the Nevada Supreme Court has created precisely the problem that renders the death penalty unconstitutional: it imposes "the penalty of death . . . in an arbitrary [and] capricious manner" by improperly rewriting "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg*, 428 U.S. at 195.

As discussed above, until recently, the law governing the weighing of aggravating and mitigating circumstances has been clear, at least with respect to the role of the outweighing finding in the capital sentencing scheme. The Nevada Supreme Court's departure from that law has created two vagueness problems, under both the Eighth and Fourteenth Amendments, rendering the statute unconstitutional.

First, the Eighth Amendment prohibits the use of "vague propositional factor[s]" in the sentencing decision. *See Tuilaepa v. California*, 512 U.S. 967, 974 (1994). This is because this Court's entire death penalty jurisprudence is aimed at ending "arbitrary and capricious sentencing." *See id*. A vagueness challenge under the Eighth Amendment asserts that "the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result

leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard v. Cartwright*, 486 U.S. 356, 361–62 (1988) (citing *Furman v. Georgi*a, 408 U.S. 238).

Nevada Revised Statutes § 175.554 is without ambiguity: "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." This language requires two findings. *Johnson v. State* is also without ambiguity: "This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and *we conclude that it is in part a factual determination, not merely discretionary weighing*." 59 P.3d at 460 (emphasis added). This language also makes clear two findings are required.

Castillo's recent holding that "the weighing of aggravating and mitigating circumstances is not part of death-eligibility under our statutory scheme" directly contradicts the statute and the Nevada Supreme Court's prior case law. *Castillo*, 442 P.3d at 561.

Taking *Castillo* as law, the statutory scheme must be vague because the Nevada Supreme Court has taken two opposite positions on its meaning. And these two opposite readings of death eligibility must also mean that the jury in Emil's case was not adequately informed of what it needed to find in order to impose the death penalty. If the Nevada Supreme Court can interpret the statutory scheme one

way for thirty years and then interpret it entirely differently, it must follow that lay jurors would experience the same problem.

This distinction matters. In *Holloway v. State*, the Nevada Supreme Court held that "other matter" evidence could be considered as part of sentence selection, but not for eligibility. 6 P.3d 987, 997 (2000); see *also* Nev. Rev. Stat. § 175.552(3). However, the language in *Castillo*, now, calls into doubt the jury instructions the Nevada Supreme Court has carefully crafted over the years: "Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed . . . ." *Castillo*, 442 P.3d at 561 (internal citations omitted). If, as the *Castillo* opinion indicates, weighing is no longer part of the eligibility determination, weighing is also no longer part of the narrowing function. *See Holloway*, 6 P.3d at 996. This, in turn, calls into question this Court's conclusion that "other matter" evidence may not be considered as part of the weighing process. *Id*.

The conflict between *Holloway* and *Castillo* demonstrates the vagueness now present in Nevada's death penalty scheme. This lack of clarity is prohibited by *Maynard*, and invites jurors to do that which *Furman*—and the Nevada Legislature—sought to prevent: impose death arbitrarily. *See Holloway*, 6 P.3d at 996 (describing how "Nevada Legislature passed and the Governor approved Senate Bill No. 220" to "implement [the] narrowing function" required by Constitution). As

a result of the Nevada Supreme Court's "vague construction" of an otherwise clear statutory requirement, there is "no principled way to distinguish" cases in which the death penalty is imposed from cases in which it is not. *Maynard*, 486 U.S. at 363 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)). This creates a "substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the [Eighth Amendment], is inflicting the punishment arbitrarily." *Furman*, 408 U.S. at 276-77 (Brennan, J., concurring). Because the Nevada Supreme Court's new interpretation of Nevada Revised Statutes § 175.554 does not channel and limit the jury's discretion to prevent the arbitrary and capricious imposition of death, the statute is unconstitutionally vague under the Eighth Amendment. In its attempt to "tinker with the machinery of death . . . by develop[ing] procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor," the Nevada Supreme Court has instead eviscerated the *Furman* requirement from Nevada's statute in such a way that it underscores the arbitrary and capricious imposition of the ultimate punishment. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackman, J., dissenting from denial of cert.).

Second, the Fourteenth Amendment forbids statutes that fail to convey what they prohibit. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The requirement for clarity is enhanced in criminal statutes. *United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009). Though the language of Nevada Revised Statutes § 175.554, and the Nevada Supreme Court's prior precedent, has been clear, the Nevada

Supreme Court's deviation from that language has created irreconcilable vagueness. Indeed, the Nevada Supreme Court's apparent propensity to disagree with itself about this language can only reflect a vagueness in the statute. For, if the Nevada Supreme Court cannot agree with its prior interpretation, an ordinary person cannot be expected to know how a capital defendant becomes death eligible. Furthermore, under the Nevada Supreme Court's equivocal interpretations, capital defendants themselves cannot be expected to know with reasonable certainty what factors and findings render them death-eligible, in violation of the Due Process Clause. *See Maynard*, 486 U.S. at 361. Because the statute is now vague under the Fourteenth Amendment's due process clause, this Court must declare it unconstitutional.

C. This Court should clarify and consolidate its Sixth Amendment jurisprudence to bring *Andres* and *Mullaney* into the fold with *Apprendi* and its progeny.

The Nevada Supreme Court's latest interpretation of Nevada's capital-sentencing scheme means that a jury renders a defendant death eligible after the first step, but can walk back that determination of death eligibility in the second step. This decision conflicts with this Court's jurisprudence in two cases: *Andres v. United States*, 333 U.S. 740 (1948), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). When 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.

1. The Nevada Supreme Court's ruling is contrary to *Andres* and *Mullaney*, which establish that juries advance findings in rendering a verdict.

The Nevada Supreme Court's reformulation of the state's capital-sentencing law requires that the jury, instead of determining whether mitigating evidence outweighs aggravating factors as a prerequisite to considering death, use the outweighing determination to "walk-back" a death-eligibility finding to a life sentence. *See Castillo*, 442 P.3d at 561. This reformulation conflicts with a line of this Court's precedent applying the Sixth Amendment, and demands this Court's intervention. *See* U.S. Sup. Ct. R. 10(c) (listing, as a 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").

This Court first considered in *Andres v. United States* the interpretation of a federal statute that required a unanimous jury to "walk back" a sentence of death to a sentence of life. 333 U.S. 740 (1948). The federal death-penalty statute at the time, 18 U.S.C. § 567, allowed jurors to "qualify" a guilty verdict by adding "without capital punishment." *Andres*, 333 U.S. at 742 n.1 (quoting 18 U.S.C. § 567). If the jury did not qualify the guilty verdict, the death penalty was automatic. *Id.* This Court rejected a construction of the statute "whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor." *Id.* at 748. Instead, this Court explained, the jury must decide unanimously on guilt, and then decide unanimously that death was warranted. *Id.* at 748-49.

This Court's holding in *Andres* is significant because it rejected the government's attempt to treat the jury's ability to qualify a verdict as a mere

afterthought, or "walk-back" mechanism. To the contrary, this Court held that it was an important issue left to the jury, because "[a] verdict embodies in a single finding the conclusions by the jury upon all questions submitted to it." *Id.* at 748.

The Nevada Supreme Court's decision in Petitioner's case conflicts with *Andres*, reaching the exact opposite conclusion; instead of treating the second outweighing determination as an important issue to embody a single verdict, the Nevada Supreme Court treats the outweighing determination as incidental to the jury's verdict. The Nevada Supreme Court has created a sentencing scheme where a jury must unanimously determine the first step of death eligibility, but can then alleviate eligibility's rigor in the next.

This new system also raises due process implications that conflict with another decision of this Court. In *Mullaney v. Wilbur*, this Court considered a Maryland statute that required a defendant to prove he acted "'in the heat of passion on sudden provocation' in order to reduce . . . homicide to manslaughter," i.e., to "walk back" a homicide to manslaughter by proving an affirmative defense at sentencing. 421 U.S. at 684–85. This Court addressed two aspects of the Maryland statute: (1) the defendant had the burden of proving heat of passion, and (2) the statute did not require proof beyond a reasonable doubt. *Id.* at 696–701. Because the absence of heat of passion significantly increased the defendant's potential sentence, this Court concluded that both aspects of the Maryland statute violated due process. *Id.* "This is an intolerable result," this Court explained, "in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only

of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703–04.

This Court also rejected an argument that the burden should remain with the defendant "because of the difficulties in negating an argument that the homicide was committed in the heat of passion." *Id.* at 701. "No doubt this is often a heavy burden," the Court acknowledged, but "[t]he same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial." *Id.* The Constitution requires the State prove the absence of heat of passion beyond a reasonable doubt, as "this is the traditional burden which our system of criminal justice deems essential." *Id.*

In combination, *Andres* and *Mullaney* show that the construction of Nevada's capital sentencing statutes by the Nevada Supreme Court violates Emil's constitutional rights to due process and a jury verdict. The outweighing determination is a prerequisite to the jury considering a death sentence. *See Lisle*, 351 P.3d at 732. And it violates the Due Process Clause and the Eighth Amendment to make this requirement incidental to the jury's verdict, used only to qualify death eligibility under an uncertain burden of proof. *See Mullaney*, 421 U.S. at 703–04.

This reading of *Andres* and *Mullaney* demonstrates that a capital sentencing jury cannot walk back an eligibility finding under an uncertain burden of proof. Accordingly, the Nevada Supreme Court's conclusion is at odds with the holdings in *Andres* and *Mullaney*, and this Court should exercise its power to make that clear,

and to give guidance to other states with similar capital punishment schemes. *See* U.S. Sup. Ct. R. 10(c).

CONCLUSION

Because the Nevada Supreme Court's decision in Emil'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 decision should be reversed.

Respectfully submitted,

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DATED: April 30, 2020

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