No. 19-8438

IN THE SUPREME COURT OF THE UNITED STATES

June 9, 2020

RODNEY EMIL, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

a) Whether the Nevada Supreme Court's ruling did not violate Hurst v. Florida.
b) Whether the Nevada Supreme Court did not violate Petitioners' rights by requiring the jury to determine whether the mitigating circumstances did not outweigh the aggravating circumstances in imposing the death penalty.
c) Whether the Nevada Supreme Court's ruling did not violate Furman v. Georgia and did not render Nevada's capital sentencing statute unconstitutionally vague.

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STATEMENT OF THE CASE

In 1988, Rodney Emil (hereinafter "Petitioner") was convicted of First-Degree Murder With Use of a Deadly Weapon and sentenced to death for the shooting of his step-father, Charles Emil, on Father's Day in 1984. His convictions and sentence were affirmed on direct appeal. Emil v. State, 105 Nev. 858, 784 P.2d 956 (1989). Remittitur issued on March 14, 1990.

Petitioner filed a timely first post-conviction petition and motion for new trial in 1990. The denial of the motion for new trial was affirmed on appeal in an unpublished order. Petitioner then filed a second state habeas petition in 1992 which was denied by the district court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court in an unpublished order. Remittitur issued on September 15, 2000.

After litigating a federal habeas petition for several years, Petitioner returned to state court and filed third petition on June 19, 2006. That petition was also denied and again affirmed by the Nevada Supreme Court in an unpublished order. Petitioner then filed a fourth petition on October 7, 2013. This petition was also denied and affirmed on appeal. Remittitur on this appeal issued on November 7, 2016.

On January 11, 2017, Petitioner filed a fifth petition. The State filed its Response and Motion to Dismiss on February 2, 2017. On May 11, 2017, the district court denied Petitioner's fifth petition. The district court filed its Findings of Fact, Conclusions of Law and Order on June 5, 2017. On July 5, 2017, Petitioner filed a Notice of Appeal.

On September 13, 2019, the Nevada Supreme Court issued an Order affirming the denial of Petitioner's fifth petition. Petitioner's Petition for Rehearing was denied on December 6, 2019. Remittitur issued on December 31, 2019.

Petitioner filed the instant Petition for Writ of Certiorari on May 4, 2020.

ARGUMENT

I. PETITIONER'S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.

Petitioner's request for extraordinary relief does not present a conflict between inferior courts or an important federal question. This Court should reject Petitioner's attempt to entice it into reviewing the Nevada Supreme Court's denial of Petitioner's unsupported claim that the Nevada Supreme Court should not be permitted to reweigh the aggravating and mitigating circumstances in death penalty cases on appeal.

Rule 10 of the Rules of the Supreme Court of the United States (RSCUS) precludes discretionary intervention in this matter. Certiorari is only warranted where there is a

substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled. It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts § 295 (2012). As explained in Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974), "[t]his Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, "[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

An important question of federal law is one that goes beyond whether the alleged error complained of "is undesirable, erroneous or even 'universally condemned.'" Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

Petitioner does not allege a substantial conflict or an important federal question. Instead, Petitioner complains that this Court should use the decision in Hurst v. Florida, 577 U.S. __, __, 136 S. Ct. 616 (2016) as cause to review the Nevada Supreme Court's affirmance of Petitioner's conviction. Petitioner also contends that the Nevada's procedure for allowing the jury to determine whether the death penalty will be imposed is inadequate. Both Petitioner's claims are meritless and, thus, present neither a substantial conflict nor an important federal question warranting review by this Court.

a. The State procedural bars constitute an adequate and independent state law ground precluding relief.

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904. The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to postconviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. at 231, 112 P.3d at 1074. Additionally, the Nevada Supreme Court has held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075.

Here, remittitur issued from Petitioner's direct appeal on March 14, 1990. This means that Petitioner had until March 14, 1991, to file a timely habeas petition. Petitioner's underlying Petition was filed on January 11, 2017, nearly 27 years after remittitur issued and in excess of the one-year time frame. Therefore, Petitioner's claims are time barred and review by this Court should be precluded.

Even if the one-year rule did not begin to run until Petitioner's new issue was available, his claims are still time barred. Petitioner's contention is that appellate courts should be precluded from reweighing aggravating circumstances against mitigating circumstances to uphold a death sentence on appeal. Petitioner premises this contention upon Hurst v. Florida, 577 U.S. __, __, 136 S. Ct. 616 (2016). Petition 1-2. It is indisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. As such, this claim is time barred because Petitioner failed to raise it within one year of Ring's publication. The district court judge correctly applied the one-year time bars in denying the petitions below. Thus, there were adequate and independent state law grounds for denying Petitioner's Petition. Therefore, review by this Court should be precluded.

Further, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction."

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). The State raised this bar in its Response and Motion to Dismiss. More than 5 years has passed since remittitur issued from Petitioner's direct appeal on March 14, 1990. Indeed, over 30 years have passed since Petitioner's direct appeal was final. As such, the State pled statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against his Fifth Petition. After such a passage of time, the State is prejudiced in its ability to answer this Petition and retry the penalty-phase. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in the 1980s. The district court was correct in basing dismissal of the petition in part on NRS 34.800 and, thus, there were adequate and independent state law grounds for denying Petitioner's Petition. Therefore, review by this Court should be precluded.

Moreover, claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b). The failure to raise grounds for relief at the first opportunity is an abuse of the writ. NRS 34.810(2). Additionally, petitions that re-raise

previously rejected complaints must be dismissed. Id. Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has emphasized that: "[a] court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 733 (2016) ("[A] petition ... has been filed within a reasonable time after the ... claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became available to him. Petitioner's contention is that, because of the decision in Hurst, this Court should reexamine Nevada's procedures for allowing a jury to determine whether or not the death penalty is warranted. Petition 9-12. It is indisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S. Ct. at 621-22 ("[t]he analysis the Ring Court

applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Petitioner's failure to raise this claim by June 24, 2003, amounts to a waiver. Petitioner could have raised their Ring complaint during the litigation of his prior petitions or could have filed an additional petition raising this contention. This claim could have been presented to the Nevada Supreme Court at any point after June 24, 2002. Petitioner's failure to do so renders his claim procedurally barred under NRS 34.810.

Certiorari should be denied because Petitioner's delay in raising these arguments amounts to an adequate and independent state law ground precluding relief. "This Court will not review a question of federal law decided by a state court if the decision is sustainable on a state law ground that is independent of the federal question and adequate to support the judgment." Lee v. Kemna, 534 U.S. 362, 375, 122 S. Ct. 877, 885 (2002); Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). This rule applies whether the state law ground is substantive or procedural. Id. The adequate state ground doctrine applies to bar federal review when the state court declines to address an inmate's federal claims because the inmate had failed to meet state procedural requirements.

b. Petitioner has failed to present an important federal question.

Petitioner argues that Hurst held the weighing determination, like the finding of an aggravating circumstance, constitutes an "element" of the offense that must be proven by the State beyond a reasonable doubt. This interpretation of Hurst is farfetched and disingenuous. It is one thing to argue for an extension of law based on existing precedent,

but quite another to misrepresent the holding of a case. Counsel's mischaracterization of the holding of Hurst strains the borders of candor to the court.

This Court summarized its holding in Hurst in the first two paragraphs of the opinion thusly:

> A Florida jury convicted Timothy Lee Hurst of murdering his coworker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
>
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst, 577 U.S. at __, 136 S. Ct. at 619. Hurst does not cite to the reasonable doubt standard because its holding only concerns the identity of the fact finder, not the standard of proof. The holding of Hurst is founded upon the Sixth Amendment right to a jury, not the Fourteenth Amendment Due Process requirement for proof beyond a reasonable doubt. Hurst is silent on that issue. On remand, the Florida Supreme Court interpreted Hurst as simply requiring that all critical findings necessary to imposition of the death penalty must be found by the jury, not the judge. Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) ("In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances"). After Hurst, Florida now requires all

necessary findings to be made by a jury rather than a judge, but still only applies the reasonable doubt standard to the existence of the aggravating factors, not the weighing. Id.

In Petitioner's case, a jury made all necessary findings for the death penalty, including weighing, in full compliance with Hurst, which is nothing more than an application of Ring. Accordingly, Hurst does not represent an intervening change in law which requires discretionary intervention by this Court.

Many other state courts have rejected an interpretation of Hurst that would extend the beyond-a-reasonable-doubt standard to the weighing determination:

> Importantly, the [Hurst] opinion did not hold that weighing must be done beyond a reasonable doubt. Indeed Hurst says nothing at all about whether the weighing of aggravating and mitigating circumstances must be determined beyond a reasonable doubt. And Leonard points to no such discussion. Instead he parses the language of Hurst to infer the Court's meaning.

Leonard v. State, 73 N.E.3d 155, 169 (Ind. 2017). Evans v. State, No. 2013-DP-01877-SCT, 2017 Miss. LEXIS 249, at *78 (June 15, 2017) ("The Hurst decision did not rest upon or even address the beyond-a-reasonable-doubt standard"); People v. Rangel, 62 Cal.4th 1192, 1235, 367 P.3d 649, 681 (2016), cert. denied, 2017 U.S. LEXIS, 85 U.S.L.W. 3325 (2017) ("The death penalty statute . . . does not require . . . findings beyond a reasonable doubt . . . that the aggravating factors outweighed the mitigating factors. . . . . Nothing in Hurst . . . affects our conclusions in this regard."); People v. Jones, 3 Cal. 5th 583, 618-619, 220 Cal.Rptr.3d 618, 398 P.3d 529 (2017); Ex parte Bohannon, 222 So.3d 525, 532-533 (Ala. 2016), cert. denied, 2017 U.S. LEXIS 871 (2017) ("Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for

the death penalty—the plain language in those cases requires nothing more and nothing less."); State v. Mason, 2016 Ohio8400 ¶ 42 (Ohio App.3d) ("Hurst did not expand Apprendi and Ring."). Petitioner's expansive reading of Hurst is undermined by the denial of certiorari in Rangel and Bohannon. This Court allowed the rejection of Petitioner's argument by the California and Alabama Supreme Courts to stand. If this Court intended the overbroad view of Hurst suggested by Petitioner, certiorari would have been granted to give guidance to the lower courts.

Well before Hurst, every federal circuit court to have addressed the argument that the reasonable doubt standard applies to the weighing of aggravating and mitigating circumstances has rejected it, reasoning that the weighing process constitutes not a factual determination, but a complex moral judgment. See United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005). Under Petitioner's interpretation of Hurst, all of these cases would now be overruled; however, they all remain good law even though Hurst was published almost two years ago. The fact that not one of these leading cases on the issue was even mentioned by the Court in Hurst or since been overruled belies Petitioner's assertion that Hurst addressed such an issue. Nor did this Court in Hurst overrule or even discuss its own authority that weighing is "a moral decision that is not susceptible to proof." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934 (1989); Caldwell v. Mississippi, 472

U.S. 320, 340 n. 7, 105 S. Ct. 2633 (1985); see also United States v. Sampson, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that Kansas v. Carr undermines the claim that Hurst requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard). Clearly, Petitioner's interpretation of Hurst is against the great weight of authority.

Another strong reason to reject Petitioner's dubious construction of Hurst is how this Court dealt with its own precedent in Hurst. Hurst cited Walton v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047, 3055 (1990), without overruling it. Hurst, 577 U.S. at __, 136 S. Ct. at 622. This is telling because Petitioner's view that Hurst requires application of the beyond a reasonable doubt standard to the weighing of aggravating against mitigating circumstances is in direct conflict with Walton:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650, 110 S. Ct. at 3055 [emphasis added]. If this Court intended the holding Petitioner attributes to Hurst, it would have addressed this direct conflict. Indeed, where Walton conflicted with Ring, this Court squarely addressed the issue and overruled Walton in part. Ring, 536 U.S. at 609, 122 S. Ct. at 2443 ("we overrule Walton to the extent that it allows a sentencing judge ... to find an aggravating circumstance necessary for imposition of the death penalty.").

In Rauf, the Delaware death penalty scheme was held unconstitutional because it allowed for a judge to find the existence of an aggravating circumstance and to conduct weighing and did not require juror unanimity. Rauf v. State, 145 A.3d 430 (Del. 2016). While these decisions were "prompted" in part by the Hurst decision, the analysis actually required the court "to interpret not simply the Sixth Amendment itself, but the complex body of case law interpreting it," leading to "a diversity of views on exactly why the answers to the questions are what we have found them to be." Id. Specifically, Question 4 which applies the reasonable doubt burden of proof to the weighing process, there's nothing in the Rauf opinion which cites to the Hurst case as the basis or reason for that particular decision. Id. In fact, the concurrences suggest that the beyond-a-reasonable-doubt standard applies to weighing because of historical analysis and the Delaware Constitution rather than as a direct requirement of Hurst. Id. at 481-2 (Strine, concur), 484-5 (Holland, concur).

Under Nevada law, weighing is only part of death "eligibility" to the extent a jury is precluded from imposing death if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstances. Lisle v. State, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). But this does not mean that weighing is part of the narrowing aspect of capital punishment the same as aggravating circumstances. Id. Instead, weighing, by definition, is part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the "selection" phase of the capital sentencing process. Id. Petitioner ignores that Nevada's use of the term, "eligibility," unlike the federal courts, has historically referred to both narrowing and individualized selection. Id. A State

Supreme Court's interpretation and construction of its own state statutes is binding on all federal courts. See e.g., Ward v. Illinois, 431 U.S. 767, 772-73, 97 S. Ct. 2085, 2089 (1977); Hortonville Joint Sch. Dist. v. Hortonville Educ. Asso., 426 U.S. 482, 488, 96 S. Ct. 2308, 2312 (1976). Petitioner is not at liberty to re-interpret Nevada statutes in a manner inconsistent with the Nevada Supreme Court's own interpretation.

Notably, the Apprendi line of cases expressly acknowledge that they have no effect on sentence selection. See, e.g., Cunningham v. California, 549 U.S. 270 (2007) ("Other States have chosen to permit judges genuinely 'to exercise broad discretion … within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal.") [internal citations omitted]. This is further supported by the expressly limited nature of Hurst's overruling of Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst only overrules Spaziano and Hildwin "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty," and that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 136 S. Ct. at 624. But in Spaziano, the Supreme Court also held that the Sixth Amendment right to trial by jury has no effect on sentence selection. Spaziano, 468 U.S. at 459-62. That holding from Spaziano remains undisturbed after Hurst, and Hurst thus has no impact on the weighing process that is part of the sentence selection process in Nevada.

Petitioner's contention does not merit discretionary intervention by this Court because he fails to raise an important federal question and/or demonstrate a substantial conflict between inferior courts.

II. WERE THIS COURT TO CONSIDER PETITIONER'S CLAIMS, THERE IS STILL NO REASON TO INTERVENE BECAUSE PETITIONER'S CLAIMS ARE MERITLESS.

Even if this Court were willing to ignore its own rules and precedents in order to consider Petitioner's challenge to the Nevada Supreme Court's upholding standing precedent, there still is no reason for this Court to intervene since Petitioner's claims are meritless.

a. Hurst is Not Retroactive and Hurst is an application of Ring.

As explained supra, Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 136 S. Ct. at 621-22. The entirety of the Court's discussion in Hurst focused on applying Ring to the case before it. Id. This Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S. Ct. 2519, 2522-27 (2004). After an extensive analysis, the Court concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S. Ct. at 2526-27.

Accordingly, several other courts have concluded that Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See Lambrix v. Sec'y, Florida Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017); Lambrix v. Secretary, 872 F.3d 1170, 1182-1183 (11th Cir.2017); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017); In re Coley, 871 F.3d 455 (6th Cir. 2017).

Given the conclusion that Hurst is nothing more than an application of Ring, it necessarily follows that Hurst is not retroactive the same as Ring.

The Delaware Supreme Court appears to be the lone dissenter from the view that Hurst is not retroactive and instead held that its precedent interpreting Hurst had retroactive application as a watershed rule of criminal procedure. Powell v. State, 2016 Del. LEXIS 649, p. 10-11 (Del. 2016). However, the Delaware Supreme Court distinguished its precedent applying Hurst from Hurst and Ring. Id. at 9 ("unlike Rauf, neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof.").

It is important to note that this burden of proof issue is the entire point of Petitioner's argument. This conclusion, by the only Court offering any support to Petitioner's position, that his argument is fundamentally distinguishable from Hurst, should be fatal to his claim. Regardless, reliance upon the watershed rule of criminal procedure exception to the bar against retroactive application to final convictions is problematic because "with the exception of the right to counsel in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S. Ct. 792 (1963), the Supreme Court has not recognized any such rule." Ennis v. State, 122 Nev. 694, 701, 137 P.3d 1095, 1100 (2006). Petitioner's conviction was final with the remittitur issued in 1990 from his direct appeal. As such, neither Ring nor Hurst apply to this matter.

b. Neither appellate reweighing nor the selection decision implicates Hurst.

Either Petitioner is misusing Hurst as a tool to raise a burden of proof challenge to the post-death eligibility selection determination or he is suggesting that the Nevada Supreme Court's reweighing analysis on appeal violated Hurst. Both of these complaints

are equally unpersuasive because the Nevada Supreme Court has rejected the view that the post-death eligibility selection decision is a factual determination.

Ring applied Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), to Arizona's death penalty scheme, which allowed a judge to determine whether a statutory aggravating circumstance existed. The Ring Court determined that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S. Ct. at 2443. Similarly, Hurst concluded:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 577 U.S. at __, 136 S. Ct. at 624.

The beyond-a-reasonable-doubt standard does not apply to the selection phase of a capital sentencing proceeding since it is not a factual determination. Nevada capital penalty proceedings comply with the requirements of Apprendi, Ring and Hurst since a jury determines death eligibility using the beyond-a-reasonable-doubt standard:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

Once the jury determines that the prosecution has established the presence of one or more aggravating circumstances beyond a reasonable doubt, thereby establishing death eligibility, the question becomes one of determining the appropriate punishment. However, this second step "is not part of the narrowing aspect of the capital sentencing process. Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what [this Court] has referred to as the selection phase of the capital sentencing process." Lisle v. State, 131 Nev. ___, ___, 351 P.3d 725, 732 (2015). This weighing is not a factual determination and is not subject to the beyond-a-reasonable-doubt standard. Nunnery, 127 Nev. ___, 263 P.3d at 251-53. The Court reached this conclusion in the context of a Ring and Apprendi challenge to the omission of the beyond-a-reasonable-doubt standard from Nevada's weighing instruction. Id.

Most importantly, this Court has recently upheld its decision in Clemons. McKinney v. Arizona, 140 S. Ct. 702 (2020). In McKinney, the Ninth Circuit ruled that the Arizona Supreme Court had failed to properly weigh consider mitigating evidence and remanded the case back to the Arizona Supreme Court. Id. at 706. On remand, the Arizona Supreme Court reweighed the aggravating and mitigating circumstances and upheld both McKinney's death sentences. Id. This Court held that such reweighing was permitted under Clemons. Id. at 707. This Court also held that Clemons is unaffected by the decisions in Hurst and Ring. Id. at 708 ("In short, Ring and Hurst did not require jury weighing of aggravating and mitigating circumstances, and Ring and Hurst did not overrule Clemons so as to prohibit appellate reweighing of aggravating and mitigating circumstances.").

Additionally, this Court ruled that Ring and Hurst do not apply retroactively on collateral review. Id.

Nevada has long rejected any attempts to apply a reasonable doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the reasonable doubt standard does not apply to this individualized decision by the jurors: "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. ___, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (*citing* Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934 (1989)); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S. Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond a reasonable doubt standard is permissible because the states enjoy a broad range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and

> aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S. Ct. 2516, 2525 (2006) (*citing* Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S. Ct. 2320 (1988)). "Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S. Ct. 3047 (1990). Accordingly, Hurst imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

Moreover, Appellant's reliance on Andres v. United States, 333 U.S. 740 (1948), and Mullaney v. Wilbur, 421 U.S. 684 (1975), is misguided. In Andres, the defendant was challenging a statute which required that a jury, after finding the defendant guilty of first degree murder, must qualify that verdict as "without capital punishment," otherwise the death penalty would be mandatory. 333 U.S. at 746. This automatic imposition of the death penalty upon the finding of first degree murder was determined to be unconstitutional as the statute was vague and a reasonable juror could conclude that, unless the jurors were unanimously against death, the imposition of the death penalty must stand. Id. at 752. This "walking back" requirement, as Appellant refers to it, is absolutely nowhere to be found in Nevada's death penalty statute. See NRS 175.554.

Further, in Mullaney, which does not apply to the death penalty whatsoever, the Supreme Court found that it was improper for the Maine homicide statutes to require that a defendant prove "heat of passion" by a preponderance of the evidence in order to reduce a murder to the lesser crime of manslaughter. 421 U.S. at 703-04. Instead, the Supreme

Court held that the State must prove the absence of heat of passion beyond a reasonable doubt. Id. This is absolutely inapplicable in the instant case because Appellant is not challenging Nevada's first degree murder statute and the jury does not begin with the presumption of death as Appellant mistakenly claims. Because Nevada's weighing procedures do not require that a jury qualify their verdict to decide against the death penalty and does not require that a defendant prove mitigating circumstances beyond a reasonable doubt, Appellant's reliance on these cases is misguided. Therefore, the Nevada Supreme Court's decision does not conflict with either Mullaney or Hurst and this Court should reject Petitioner's claims.

c) The Nevada Supreme Court's ruling does not violate Furman v. Georgia.

Petitioner also claims that the Nevada Supreme Court's ruling violates Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972), as it is unconstitutionally vague. Petition at 14-19. Petitioner further claims that the Nevada Supreme Court has departed from the plain language of the statute. Id.

Furman required that the States create death penalty statutes that were neither vague nor arbitrarily applied. Furman, 408 U.S. at 256-57, 92 S. Ct. at 2735-36. Petitioner has failed to demonstrate that Nevada's death penalty statute is either vague or arbitrary. Further, Petitioner has failed to demonstrate that the Nevada Supreme Court has departed from the plain language of Nevada's death penalty statute. NRS 175.554 states:

> In cases in which the death penalty is sought:
> 1. The court shall instruct the jury at the end of the penalty hearing, and shall include in its instructions the aggravating circumstances alleged by the prosecution upon which evidence has been presented during the trial or at the hearing. The court

> shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing.
> 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.
> 4. If a jury imposes a sentence of death, the jury shall render a written verdict signed by the foreman. 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.

Petitioner cites to Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002), in support of his proposition that the Nevada Supreme Court has been inconsistent in its rulings regarding the death penalty and, thus, the statute must be vague. Petition at 16. However, Petitioner neglects to mention that Johnson was expressly overruled by the Nevada Supreme Court in 2011. See Nunnery, 127 Nev. 749, 263 P.3d 235. Petitioner's failure to bring this to the Court's attention is disingenuous and it further demonstrates that Nevada's death penalty statute is not vague. Similarly, the Nevada Supreme Court's ruling in Castillo v. State, 135 Nev. 126, 442 P.3d 558 (2019) is consistent with Nevada law. Thus, Petitioner's claim fails and this Court should deny the Petition.

Similarly, Petitioner's reliance on Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) is equally misleading to this Court. See Petition at 17-18. Petitioner once again neglects to inform this Court that Hollaway was expressly overruled by Lisle, 131 Nev. 356, 351 P.3d 725 (2015). Further, Castillo is not inconsistent with the holding in Hollaway as Petitioner claims. In Hollaway, the Nevada Supreme Court simply stated that "other matter" evidence cannot be used in considering death penalty eligibility. Hollaway, 116 Nev. at 746, 6 P.3d at 997. However, the Hollaway Court stated that, after weighing the aggravating factors against the mitigating circumstances and determine that the defendant is death penalty eligible, the jury still has the discretion to impose a sentence less than death. Id. at 746, 6 P.3d at 996. Therefore, the Nevada Supreme Court's ruling in Castillo, 135 Nev. 126, 442 P.3d 558 is consistent with its ruling in Hollaway. This further demonstrates that Nevada's death penalty statute is not vague. Thus, Petitioner's claim fails and this Court should deny the Petition.

As the Nevada Supreme Court has consistently ruled on Nevada's death penalty procedures, Petitioner has failed to demonstrate that NRS 175.554 is vague. Therefore, Petitioner has failed to demonstrate that the Nevada Supreme Court has violated Furman. Further, as Petitioner relies on cases which are consistent with the Nevada Supreme Court's ruling in Castillo, Petitioner has similarly failed to demonstrate that the Nevada Supreme Court has departed from the plain language of NRS 175.554. Because Petitioner received all the protections required by Ring, and Petitioner fails to demonstrate that Nevada's death penalty statute violates Furman, the Nevada Supreme Court did not err in affirming the

district court's denial of Petitioner's Petition for Writ of Habeas Corpus. As Petitioner has provided this Court only meritless arguments, his Petition must be denied.

CONCLUSION

Petitioner fails to establish that the exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such, this Court should deny certiorari.

Dated this 9th day of June, 2020.

Respectfully submitted.

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