No.

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF NEVADA,
Petitioner,
v.
SHAWN RUSSELL HARTE,
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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QUESTIONS PRESENTED
(Capital Case)

1. Does the United States Constitution demand the conclusion that "it is unconstitutional to base an aggravating circumstance in a capital prosecution on a felony that was used to obtain first-degree murder conviction?"

2. Does the United States Constitution support the conclusion of the Nevada Supreme Court that prohibits "basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony-murder?"

3. When evaluating the question of whether a statutory scheme genuinely narrows the class of murderers eligible for the death penalty, does the United States Constitution call for an objective or qualitative analysis or should the reviewing court determine whether the scheme "sufficiently" narrows the class?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, the State of Nevada, by and through counsel, and petitions this Court for a Writ of Certiorari, and reversal of the Opinion of the Supreme Court of the State of Nevada.

OPINIONS AND JUDGMENTS BELOW

The Nevada Supreme Court opinion affirming the order of the trial court granting relief from a sentence of death, *Harte v. State*, 124 Nev. ___, 194 P.3d 1263 (2008) is set out in the appendix. In addition, the appendix includes prior decisions of the Nevada Supreme Court, *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005). The *Harte* decision re-affirmed the more extensive ruling in *McConnell*. No review had been available for the *McConnell* decision because, while the Court announced a rule of law in that case, that defendant did not obtain relief. Thus, there was no justiciable controversy.

JURISDICTIONAL STATEMENT

The Nevada Supreme Court ruled that the Constitution of the United States, and *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988) prohibits the state, in a capital murder prosecution, from obtaining a first-degree murder conviction in whole or in part upon a felony-murder theory and then using the same underlying felony as an aggravating circumstance that then allows consideration of the death penalty. That

procedure is allowed by statute but the Nevada Supreme Court ruled that the procedure was repugnant to the Constitution of the United States as construed in *Lowenfield v. Phelps, supra.* This Court has jurisdiction by 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. The Eighth Amendment to the United States Constitution

3. Nev. Rev. Stat. Section 200.030 (set out at length in the Appendix).

4. Nev. Rev. Stat. Section 200.033 (set out at length in the Appendix).

STATEMENT OF THE CASE

Shawn Harte and two confederates robbed and killed taxi driver John Castro. Harte and accomplice Weston Sirex rode in the back seat of the cab. In a relatively remote area of Washoe County, Nevada, while the taxi was slowly moving, Harte produced a handgun and shot Castro in the head. The pair then stole money from the cab, joined a third accomplice who had been following in a car and went off for dinner at Taco Bell. Castro died the following day.

Harte was charged with murder under two theories: that the murder was premeditated and

deliberate and; that the killing was committed during the course of a robbery. Both are prohibited by Nev. Rev. Stat. Section 200.030. The jury found Harte guilty but did not return a special verdict indicating which theory was applicable. Thereafter, the jury found one aggravating circumstance – that the murder was committed during a robbery and that Harte had killed the victim or knew that lethal force was to be applied. That aggravating circumstance, according to Nev. Rev. Stat. Section 200.033, allowed the jury to consider the death penalty. The jury sentenced Harte to death for the murder of Mr. Castro.

Harte appealed but the judgment and sentence were affirmed in *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

Harte's first round of state post-conviction proceedings netted no relief. Subsequently, the Nevada Supreme Court issued an opinion in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005). In that case, the Nevada Supreme Court quoted extensively from *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), and concluded that the Constitution precludes use of an underlying felony as both a rationale for a first-degree murder conviction and as an aggravating circumstance. The Court also ruled that the narrowing function of the statutory aggravating circumstance was too "slight" to pass constitutional muster. 120 Nev. at 1069.

The new rule announced in *McConnell* did not give rise to relief for that defendant. Because the decision was structured so as to avoid a justiciable controversy, no petition for review was appropriate.

Subsequently, the Nevada Supreme Court

announced that the new rule announced in *McConnell* would be applied retroactively. *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006). Again, there was no justiciable controversy because the defendant in that case obtained no relief.

Meanwhile, Shawn Harte was pursuing state post-conviction remedies. Once his second petition was before the trial court, the state of the law announced in *McConnell* and *Bejarano* was clear. The parties reached an agreement to narrow the issues and the trial court vacated the death sentence. The State then appealed that ruling to the Nevada Supreme Court in an effort to overturn the prior ruling in *McConnell*. The Nevada Supreme Court re-affirmed its holding and made it unmistakably clear that the ruling was based on this Court's ruling in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988). The Nevada Supreme Court affirmed the ruling that vacated the death penalty for the sole reason that the defendant had been charged with both premeditated murder and felony-murder, and the sole aggravating circumstance was based on that same felony-murder.

Now that there was finally a justiciable controversy, the State filed its petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Nevada Supreme Court has decided an important question of constitutional law in a way that conflicts with holdings of other state courts of last resort and of United States courts of appeals.

The Nevada Court had a few pertinent rulings. First, the Court ruled that where the indictment or

information includes a theory of first-degree murder by causing the death during robbery, arson, burglary, home invasion, or kidnapping, then unless the jury unanimously agrees to a special verdict denying any reliance on the felony-murder for its conviction of first-degree murder, the statute allowing the jury to consider the same underlying felony as an aggravating circumstance allowing for the death penalty, is unconstitutional, even with the additional element that the defendant personally killed or attempted to kill or knew that lethal force would be applied. That holding is contrary to *Lawrence v. Branker*, 517 F.3d 700 (4th Cir. 2008); *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000); *Deputy v. Taylor*, 19 F.3d 1485, 1497-98, 1500-02 (3d Cir.)(allowing double counting of felony-murder factor), *cert. denied*, 512 U.S. 1230, 114 S.Ct. 2730, 129 L.Ed.2d 853 (1994); *Johnson v. Dugger*, 932 F.2d 1360 (11th Cir.) (same), *cert. denied*, 502 U.S. 961, 112 S.Ct. 427, 116 L.Ed.2d 446 (1991); *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.)(allowing double-counting of felony-murder factor, and holding that *Lowenfield* overruled contrary holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985)), *cert. denied*, 493 U.S. 959, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989); *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir.)(allowing felony murder double-counting because of narrowing guilt-phase element that "offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration ... of ... armed robbery, or simple robbery."), *cert. denied*, 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988); *Julius v. Johnson*, 840 F.2d 1533, 1540 (11th Cir.)(allowing double-counting of felony-murder factor), *cert. denied*, 488 U.S. 960, 109

S.Ct. 404, 102 L.Ed.2d 392 (1988).

In addition, several state courts of last resort have rejected the holding of the Nevada Court. *See State v. Fry*, 138 N.M. 700, 126 P.3d 516 (2005); *Thorson v. State*, 895 So.2d 85 (Miss. 2004); *Blanco v. State*, 706 So.2d 7 (Fla. 1997); *People v. Marshall*, 790 P.2d 676 (Cal. 1990); *Ferguson v. State*, 642 A.2d 772 (Del. 1994); *State v. Franklin*, 580 N.E.2d 1 (Ohio 1991).

The issue is significant in that the states that allow the death penalty commonly hold that a killing during an enumerated felony may amount to the highest degree of murder, and that the same underlying felony (plus personal involvement in the killing) tends to make the killer eligible for the death penalty. The Nevada Court outlawed such a statutory scheme, ostensibly on the authority of *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988). This Court should grant certiorari to correct the notion (or announce) that such double-use of an underlying felony is prohibited by the Constitution.

The second ruling of the Nevada Supreme Court was that the Nevada statutory scheme does not "sufficiently narrow" the categories of murderers subject to the death penalty because so many murders involve robbery, arson, burglary, home invasion or kidnapping. 120 Nev. at 1065, 102 P.3d at 621. That is, the court seems to have held that the narrowing function must exclude a sufficient number of killers. This Court has rejected that analysis in *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993). Other courts of last resort have applied that decision to cases involving felony-murder as an aggravating circumstance and concluded that *many* murders involve

enumerated felonies, but not *every* murder involves such felonies and that, consequently, using commission of certain limited felonies, plus personal involvement in the killing, as an aggravating circumstance, is not prohibited by the Constitution. Those courts include *Steckel v. State*, 711 A.2d 5 (Del.Supr. 1998); *State v. Fry*, 126 P.3d 516 (N.M. 2005) and *State v. Tillman*, 750 P.2d 546, 571 (Utah 1987)(where aggravating circumstances is objective and does not apply to "all" murders, then it narrows the class.).

United States Courts of Appeals have also rejected the analysis that an aggravating circumstance must exclude a sufficient number of murderers and ruled that the aggravator need only be clear, objective and not universal. *See Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989); *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993)(where aggravating circumstance "does not embrace anyone who committed murder, but only those who did so in connection with a continuing criminal enterprise" the aggravator serves the narrowing function); *Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996)(noting that aggravator concerning motive of pecuniary gain does not necessarily apply to *all* who take property by force, the aggravator is not universal and thus serves the narrowing function).

The question ought not to be whether the aggravating circumstance occurs with some frequency, but whether the aggravating circumstance applies to all murders. Clearly not all murders involve robbery and so the aggravating circumstance does not include all killers and so it is not unconstitutional. Therefore, this Court ought to grant certiorari and then either reject or adopt the notion that an aggravating circumstance must serve to exclude some percentage of murderers

before it may be applied.

CONCLUSION

This Court ought to grant the writ of certiorari and reverse the decision of the Nevada Supreme Court.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEVADA

THE STATE OF NEVADA AND WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Appellants,
vs.
SHAWN RUSSELL HARTE,
Respondent.

No. 50161

Filed:
October 30, 2008

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Appeal from a district court order partially granting a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Affirmed.

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Appellants.

Scott W. Edwards, Reno; Thomas L. Qualls, Reno, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, MAUPIN, J.:

In this opinion, we consider the State's