No. 11-168

In the Supreme Court of the United States

JAMES M. HARRISON,
Petitioner,

v.

DOUGLAS GILLESPIE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a capital sentencing hearing when a jury is deadlocked as to any particular sentence, whether there is manifest necessity to declare a mistrial without first inquiring into the jury's latest vote tally on the weighing of aggravating and mitigating circumstances in order to discern a possible "acquittal" of the death penalty.

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STATEMENT OF THE CASE

On August 30, 2002, Petitioner James Harrison and his accomplice Anthony Prentice killed Daniel Miller at his home by striking him in the head with a hammer and stabbing him numerous times. Harrison was charged with Conspiracy to Commit Murder, Burglary, and Murder with the Use of a Deadly Weapon. On November 14, 2006, a jury returned a verdict of guilty on all counts and the matter proceeded to penalty hearing. The State's Notice of Intent to Seek the Death Penalty alleged among other things that the murder was aggravated by the torture or mutilation of the victim. Specifically, the victim suffered approximately 128 stab wounds over his head, face and body, was struck repeatedly with a blunt object consistent with a hammer, and had a large swastika carved into his body postmortem spanning his entire back. None of the injuries were by themselves lethal, which left the victim to bleed to death, a process which took well over thirty minutes.

The jury was given agreed-upon verdict forms which included four possible sentencing options for first degree murder pursuant to NRS 200.030: 1) the death penalty, 2) life in prison without the possibility of parole, 3) life in prison with the possibility of parole, or 4) a definite term of years in prison. After lengthy deliberations as to the appropriate sentence, the jury indicated it was deadlocked. Because two earlier notes from unknown jurors indicated the jury might be deadlocked between the two life sentencing options, Harrison's trial counsel requested that the court individually "poll" the jurors before discharge to

determine if they had eliminated the death penalty as a punishment:

> I'd request that we inquire from the jurors how far along in the process that they were this penalty phase, and by that I mean as this Court is well aware, they needed to make a determination if the aggravators were proved beyond a reasonable doubt. I would ask that this Court inquire of that.
>
> And then the second issue was if the weighing process between the aggravators and mitigators if they had in fact done a weighing process, and I'd ask that this Court poll the 12 individual jurors and ask them individually if any of them made the determination that the mitigation outweighed the aggravations in this matter.

PA[1] 231a. The State opposed this request as being in violation of NRS 50.065 (precluding inquiry into juror mental processes), NRS 175.531 (permitting polling only when a verdict has been reached), and NRS 175.556 (a new jury to be impaneled when a jury is unable to reach a unanimous verdict) and that there was no authority for polling of a hung jury for a partial verdict. PA 231a-232a. Although declining to "poll" the jurors as requested but cognizant of the possible double jeopardy implications, the trial court agreed that the verdict forms, whether signed or unsigned, would be collected and made available to counsel. The jury was then brought back into the courtroom where

[1] "PA" refers to Petitioner's Appendix.

the foreperson affirmed that the jury was at an impasse and after deliberations was unable to reach a verdict as to the appropriate sentence. Id. at 233a. The trial court required the foreperson to hand all of the verdict forms, whether completed or not, to the bailiff. Id. at 234a. The judge then declared a mistrial and discharged the jurors. Id.

The two verdict forms which would have declared the selection of an appropriate sentence were unmarked and unsigned. They were filed with the clerk with a cover sheet entitled "Verdict(s) Submitted to Jury but Returned Unsigned". One of these forms included death as a sentencing option in the event the jury found the aggravating circumstances outweighed the mitigating circumstances, whereas the other verdict form included only the non-death sentencing options if the jury were to conclude the mitigating circumstances outweighed the aggravating circumstances. The remaining two forms entitled "Special Verdict" were marked and signed by the foreperson indicating that the aggravating circumstance of mutilation had been established beyond a reasonable doubt and designating the mitigating circumstances that the jurors determined were established.

Meanwhile, six months later on June 20, 2007, (and just one month before the new penalty hearing was set to begin) Harrison raised the issue of double jeopardy in a Motion to Strike the Death Penalty. The basis for the motion was that subsequent affidavits obtained by the defense purportedly showed that jurors were split 9-3 between life without parole and life with parole.

PA 237a-245a. Such affidavits also indicated that jurors had allegedly decided 12-0 against the use of the death penalty. Id. The sole basis for the claim of an "acquittal" as to the death penalty consisted of identical ex-parte out-of-court affidavits obtained from just three jurors several weeks to several months following the declaration of a mistrial.

The State responded with an Opposition filed on June 29, 2007, arguing that the jury had deadlocked, not unanimously acquitted Harrison of the death penalty, and that post-trial juror affidavits to the contrary could not be considered. To rebut the defense affidavits and to demonstrate the unreliability of post-trial interviews of jurors, the State attached an affidavit from Juror Mary Pizzi declaring that the death penalty was never "off the table" as a potential punishment option for her as a juror. Id. at 246a-247a. In his Reply brief, Harrison again asserted that "each affidavit in and of itself constitutes an acquittal," and that only one individual juror needed to make the determination that mitigation evidence outweighed aggravation to take death "off the table".

At the hearing on the motion on July 12, 2007, Harrison's counsel framed the issue as follows:

> MR. WHIPPLE: I think what it really comes down to, Your Honor, is ***do those affidavits constitute a verdict***.

After listening to both sides, the court denied the motion to strike the death penalty and ruled that the State could proceed with the death penalty at the new

penalty hearing. The Order was filed that same day in open court. The Nevada Supreme Court declined to intervene by way of extraordinary writ and denied Harrison's Petition for Writ of Mandamus/Prohibition.

More than nine months later, on June 20, 2008, Harrison filed a federal Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. As in all the proceedings below, Harrison again relied upon the three post-trial juror affidavits as proof that the jury had voted 12-0 to acquit him of the death penalty before becoming deadlocked on the issue of life with or without the possibility of parole. Judge Robert C. Jones summarily denied relief reasoning that "the three affidavits Harrison has compiled do not transform the hung jury into an acquittal" and were not competent evidence of an actual verdict rendered by the entire jury within the deliberation process. PA 223a.

In the Ninth Circuit, Harrison disavowed his "verdict-by-affidavit" argument and instead focused on there being no manifest necessity for discharging the hung jury without first conducting a partial verdict inquiry into the outcome of the jury's weighing process. See PA 183a. Judge Reinhardt for the majority in a 2-1 split panel opinion reversed, concluding there was no manifest necessity to declare a mistrial without first polling the jury as to whether it had unanimously found that the mitigating circumstances outweighed the aggravating circumstance. Id. at 123a. The appeal was reheard en banc and Judge Milan Smith for the majority affirmed the district court's denial of habeas relief, holding that capital defendants do not have a

per se constitutional right to inquire about the possibility that a penalty-phase jury has reached a preliminary decision against imposing the death penalty. Id. at 31a. Accordingly, the majority held that on retrial of the penalty phase, the Double Jeopardy Clause does not preclude the State from re-seeking the death penalty as a sentencing option. Id. at 32a. It is from this en banc opinion that Harrison seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. Certiorari is unwarranted as this case largely turns upon questions of state law and unique facts

The Ninth Circuit's holding, although addressing a federal question, was expressly limited to the facts of this particular case and turned in large part upon state law and procedure regarding the form of verdicts in Nevada's capital sentencing scheme. In fact, much of the disagreement in the Ninth Circuit arose from differing interpretations of what Nevada law requires under the unique circumstances of this case. Because this appeal arose from a federal writ of habeas corpus pursuant to 28 U.S.C. § 2241 and as an exception to the Younger abstention doctrine, the Nevada Supreme Court has not weighed in on how Nevada law applies to the facts of this case. Accordingly, there remain state law questions which are in dispute and facts which are not well-developed in the record making this an inappropriate case for certiorari.

It has long been held that a trial judge's decision to declare a mistrial is accorded "great deference" by the reviewing court. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824 (1978); United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824) ("We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."). Generally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324, 104 S.Ct. 3081 (1984). This is the classic basis for a mistrial and is viewed as a nonevent that does not bar retrial. Id.

Double Jeopardy protections, while generally inapplicable to most sentencing determinations, have been extended to "trial type" capital-sentencing proceedings where the State carries a burden to prove aggravating circumstances. Bullington v. Missouri, 451 U.S. 430, 439, 108 S.Ct. 1852 (1981). In Bullington, a jury's imposition of a life sentence signified an acquittal of the death penalty thereby barring the government from re-seeking the death penalty upon grant of a new trial. Id. Likewise, a judge's finding of no aggravators and imposition of a life sentence, even though reversed on appeal due to an erroneous interpretation of law, barred the death penalty at a subsequent resentencing hearing. Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305 (1984).

However, in Sattazahn, double jeopardy protections were ***not*** triggered when the jury deadlocked at defendant's first capital sentencing proceeding following his conviction for murder, and the trial court prescribed a sentence of life imprisonment pursuant to Pennsylvania statute. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003). Even where the verdict form stated that the jury deadlocked 9-to-3 in favor of a life sentence and made no findings with respect to the alleged aggravating circumstance, neither that result – or more appropriately, that non-result – could fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence." Id. Nor was the judge's default imposition of a life sentence pursuant to statute an acquittal of the death penalty. Id. Thus, an acquittal of the death penalty for double jeopardy purposes requires a finding by the trier of fact that constitutes "legal entitlement to a life sentence" under state law.

Under Nevada's capital sentencing scheme, "the jury may impose a sentence of death only if it finds at least one aggravating circumstance beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). By statute, the reasonable doubt standard applies only to the finding of aggravating circumstances and not to the weighing process. NRS 175.554(4). Nevada interprets its weighing process consistent with Supreme Court authority as "a moral decision that is not susceptible to proof." McConnell v. State, 125 Nev. ___, 212 P.3d 307, 314-15 (2009), 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...."). A State enjoys a broad range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be 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.

Nevada law further contemplates a single verdict at the conclusion of a capital sentencing hearing that sets forth the specific penalty imposed as well as the jury's determinations regarding aggravating circumstances and the weighing process. NRS 175.554(4). The sole purpose of such determinations is to channel the jury's discretion and provide constitutional narrowing and individualized consideration in satisfaction of the Eighth

Amendment's prohibition against cruel and unusual punishment when a death verdict is returned. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983). In the absence of a unanimous verdict for the death penalty, the constitutional purpose and statutory entitlement for such determinations is non-existent.

Under Nevada law there is no right to bifurcation of capital penalty hearings into separate eligibility and selection phases where verdicts are rendered on preliminary questions:

> We submit that such a holding would not require penalty hearings to be fragmented into phases where the jury separately considers and answers the factual questions relating to whether: 1) the alleged aggravating and mitigating circumstances have been established, 2) the aggravating circumstances outweigh any mitigating circumstances, and 3) the penalty of death should actually be imposed on a defendant whom the jury has found to be death eligible.

Summers v. State, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783-84 (2006); Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002). Furthermore, Nevada precedent holds there is no right to "poll" a hung capital sentencing jury to determine if they have acquitted of the death penalty. Daniel v. State, 119 Nev. 498, 522-23, 78 P.3d 890, 906 (2003).

From this authority, a majority of the Ninth Circuit concluded that "Nevada law does not include any

procedural mechanism in which the jury's preliminary determinations [regarding aggravating and mitigating circumstances] can be embodied in a valid final verdict in an unbifurcated penalty-phase proceeding such as Harrison's." PA 201-21a. Notably, the dissenters looked at this same state authority and concluded "that there is nothing in Nevada law that would have prohibited the judge from granting Harrison's request for a poll, or asking whether the jury was at an impasse as to the imposition of the death penalty." Id. at 50a. Judge Reinhardt in his separate dissent found that the "central purpose" in Nevada's sentencing hearing "was to determine whether Harrison was eligible for a capital sentence," id. at 52a, whereas the majority concluded to the contrary that the purpose "was to impose a final sentence." Id. at 19a-20a.

There was also considerable disagreement below on whether the two special verdict forms that were marked and signed by the foreman declaring the existence of aggravating and mitigating circumstances constitute legal and final verdicts under Nevada law. The deadlocked jury "handed" all of the forms in to the court whether completed or not, but none were formally returned or read in open court. What legal effect, if any, these forms have under Nevada law in the absence of an agreed upon final sentence remains in dispute.

Also, confusion arose below as to how Nevada views the weighing process. According to Harrison's argument, weighing is "in part a factual determination [for purposes of Ring v. Arizona], not merely discretionary weighing" and thus is the equivalent of

a quasi-element which the State must prove for death eligibility. Johnson v. State, 118 Nev. 787, 802-3, 59 P.3d 450, 460 (2002). The State relies instead upon a more recent pronouncement by the Nevada Supreme Court in McConnell that the reasonable doubt standard has never been applied to the weighing process under Nevada law because weighing is largely "a moral decision that is not susceptible to proof." McConnell v. State, 125 Nev. ___, 212 P.3d 307, 314-15 (2009). Harrison has raised this purported conflict of Nevada law for the first time in federal court. Accordingly, the Nevada Supreme Court has not addressed Harrison's argument that these two cases are in conflict and this Court's ability to reach the federal question will be thwarted.

Factually, the issue as decided by the Ninth Circuit is not sufficiently preserved or developed in the record below for this Court's review. The issue as raised, both in the trial court and in the federal district court, was whether the post-trial ex parte affidavits of jurors constituted an acquittal of the death penalty for double jeopardy purposes. However, Harrison expressly abandoned this argument in the Ninth Circuit and instead framed the issue as whether there was manifest necessity to declare a mistrial of a hung jury without first polling on death eligibility questions. As a consequence, the record below was not developed with this issue in mind.

The Ninth Circuit opinion is also highly dependent upon facts unique to this particular case which are not likely to re-occur. First, rather than a motion for "polling" of individual jurors, Harrison's oral request

was in fact for the court to deviate from the previously agreed upon verdict forms and to inquire of the hung jury as to the possibility of a "partial verdict" not provided for on the existing verdict forms. Although the jury received a separate verdict form as to the existence of aggravating circumstances, none of the agreed upon verdict forms allowed the jury to record the outcome of the weighing determination separate and apart from selecting a sentence. Thus, the issue may be avoided in the future by simply altering in advance the form of verdicts that will be submitted to the jury.

Second, Harrison relies heavily upon two notes from two different jurors in support of his argument that the jury was hung only between life with and life without the possibility of parole to the exclusion of the death penalty. Significantly, the notes themselves are not preserved in the record and are only briefly mentioned in the trial transcript. PA 230a. Any indication that the jury was deadlocked between life with and life without parole does not necessarily mean the jury had unanimously, conclusively, and finally abandoned the death penalty. Furthermore, the transcript indicates there were a total of four notes from jurors, none of which appear to have been from the foreman and none of which purport to speak for the jury as a whole. Id.

Third, Harrison taints and confuses the factual record by relying upon ex-parte out-of-court juror affidavits obtained from a few jurors several weeks to several months following the declaration of mistrial and which clearly conflict as to whether jurors had in

fact ruled out the death penalty. Although Harrison has since abandoned his initial argument that these affidavits constitute official verdicts, he continues to rely upon them to convince reviewing courts that there was a 12-0 vote tally acquitting him of the death penalty.

Fourth, Harrison's motion to bifurcate the sentencing hearing, which was only recently introduced into this appeal for the first time on rehearing in the Ninth Circuit, was based on an evidentiary rationale and invoked no constitutional right to a separate death eligibility verdict. In other words, Harrison proposed bifurcation out of concern the jury may not follow the instructions to only consider certain types of evidence in making the determinations regarding aggravating and mitigating circumstances. Upon learning that the motion to bifurcate did not in fact raise the issue presented in this appeal, Judge Kozinski withdrew his concurring opinion and sided with the majority. Thus, Harrison's claim that he had preserved the issue in this appeal by filing a motion for bifurcation is not accurate.

The Ninth Circuit opinion is consistent with this Court's jurisprudence finding no double jeopardy bar to re-seeking the death penalty when a capital sentencing jury is deadlocked. Such an event is a non-decision and not an acquittal of any particular sentence. Double jeopardy only bars re-trial of the death penalty when a life sentence was previously imposed based upon a failure to find any aggravating circumstances at all. The question in this case is not whether the jury made findings that would entitle the

defendant to a life sentence, but whether there is a constitutional right to compel such preliminary determinations in the absence of a unanimous agreement on any particular sentence. More particularly, because the jury in this case appears to have found the existence of an aggravating circumstance, Harrison claims a constitutional right to a separate and independent verdict on the question of weighing of aggravating and mitigating circumstances. The Ninth Circuit's holding was expressly limited to the unique facts of this case and is dependent upon an interpretation of state law with which Harrison disagrees. Because the federal question is intertwined with disputed state law and a factual record that is incomplete or undeveloped, certiorari is inappropriate in this case.

II. There is no split of authority as this case presents a novel issue of first impression

In an effort to persuade this Court that certiorari is necessary to resolve an "intractable split of authority," Harrison analogizes this case to a related but distinct issue regarding greater and lesser offenses as in the pending Blueford case, No. 10-1320. Apparently, the issue in Blueford is whether the Double Jeopardy Clause bars retrial on a greater offense when a jury is deadlocked only as to a lesser-included offense. Regardless of whether lower courts are divided on such an issue, a jury's selection among various sentencing options is unlike a guilty or not guilty on a particular count. While the the issue regarding greater and lesser included offenses may be related, it is not directly controlling or dispositive of the Double

Jeopardy Clause's application in the capital sentencing context.

Instead of a split of authority when it comes to partial verdicts among multiple sentencing options, there is a virtual dearth of authority. It appears to be a very rare and perhaps novel issue of first impression unique to the facts of this particular case. As noted by Judge Silverman in his dissent from the Panel Opinion before the matter was reheard en banc: "there is no court case anywhere holding that the constitution requires a state trial judge to ask more specific questions about the status of the jury's unfinished deliberation in a sentencing matter entrusted to its discretion." PA 165a. He also noted that "[c]onspicuously missing from the majority opinion is a single federal case – or indeed any case – establishing a constitutional right to a partial verdict when it comes to sentencing, and certainly not when a jury is required to 'weigh' intangible factors and ultimately determine a just punishment as a matter of discretion." Id. at 168a.

Admittedly, by way of analogy and in the virtual absence of any authority directly on point, the parties below cited to and argued some of the split authority on partial verdicts between greater and lesser offenses. This was not done for any precedential value that would resolve this case, but because the rationale and reasoning may have some applicability in the capital sentencing context. For example, without detailed analysis, the Nevada Supreme Court has previously rejected an attempt to poll a "hung" capital sentencing

jury to determine if they have acquitted of the death penalty:

> Appellant asserts that before dismissing the jurors the district court should have granted his request to poll them to determine whether they had unanimously rejected death and were deadlocked over a lesser sentence. Because appellant argues that imposition of the death penalty after remand and retrial would violate the Double Jeopardy Clause, we reach this issue and conclude that the district court was not required to poll the jurors.

Daniel v. State, 119 Nev. 498, 522-23, 78 P.3d 890, 906 (2003). For support of this position, the Nevada Supreme Court cited to two out-of-state cases which concerned the greater and lesser included offenses issue. See People v. Hickey, 103 Mich.App. 350, 303 N.W.2d 19, 21 (1981); A Juvenile v. Com., 392 Mass. 52, 465 N.E.2d 240 (1984). This case authority was prefaced with an introductory signal of "*Cf*" meaning that the cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Some of this analogous rationale includes concern about a jury having reached only a temporary compromise in an effort to achieve unanimity, a jury's ability to reconsider a previous vote on any issue, and the susceptibility of a deadlocked jury to coercion. Id.

From this brief reference in Daniel, Harrison jumps to the unwarranted conclusion that Nevada aligns itself with those jurisdictions that do not allow

separate verdicts on lesser included offenses. But in Daniel, Nevada did not reach such an issue and was only drawing a comparison to the analogous but different issue concerning multiple sentencing options. Most notably, neither the majority nor the dissent in the Ninth Circuit's opinion make any citation, reference, or argument regarding the greater and lesser included offense issue. The split of authority is nowhere to be found in the Ninth Circuit's reasoning and had no part in deciding this case. Any decision by this Court that the Constitution requires separate verdicts between greater and lesser offenses would not resolve the distinct question of separate verdicts amongst multiple sentencing choices.

Nevada's statutory scheme contemplates retrial upon a jury's inability to reach a verdict and makes no allowance for polling on a partial verdict among multiple sentencing options. By statute, Nevada law allows "partial" or separate verdicts only as between co-defendants (NRS 175.491), as to lesser included offenses or an attempt (NRS 175.501), and as to each separate offense (NRS 175.511). But no Nevada statute allows for a partial verdict as to death eligibility or even as to each separate sentencing alternative considered. The Fifth Amendment protects against being placed twice in jeopardy as to an "offense". Harrison did not request a separate verdict on a lesser included offense, but on the jury's subjective weighing of aggravating and mitigating circumstances after it had already declared a deadlock. Potentially, a lesser included offense can stand alone as a separate and independent count for which a jury can render a guilty or not guilty verdict. This is not so

with alternative sentencing options and much less so with the question of weighing. The jury is not asked to convict or acquit of each of the four sentencing choices. Alternative sentences do not stand alone as separate offenses or counts which the State must prove. Rather, the jury is asked to choose among the four sentencing options the one that most appropriately fits the crime and the defendant.

Admittedly, in order to return a verdict of death the jury must find that the existence of an aggravating circumstance beyond a reasonable doubt to which this Court has extended double jeopardy protections. See Sattazahn, supra. But the existence of an aggravating circumstance is not in dispute in this case and any analogy to greater and lesser offenses must end there. The State bears no burden with regard to the intangible weighing process and the reasonable doubt standard simply does not apply. It can not be said that a capital defendant is either guilty or not guilty of "weighing" in the same way that they are either guilty or not guilty of a particular offense or as to an aggravator. Neither Nevada nor the federal Constitution extends double jeopardy protections to the weighing of aggravating and mitigating circumstances. Accordingly, a jury's individualized and highly subjective weighing determination can not be characterized as a failure of the State to prove an offense for Double Jeopardy purposes. Harrison's issue in this case would not resolve the split of authority found in the Blueford case. Rather, Harrison's issue depends upon an unprecedented argument for an extension of this Court's existing double jeopardy jurisprudence to the intangible

question of weighing aggravating and mitigating circumstances. As an issue of first impression, it is not ripe for this Court's review.

CONCLUSION

The federal question in this case is intertwined with questions of fact and state law that are in dispute and remain unresolved. Because the federal courts insisted on entertaining the federal question under an exception to the Younger abstention doctrine, the Nevada Supreme Court has not been heard on these matters. Furthermore, the issue as reached by the Ninth Circuit is different than how it was framed in the lower courts which has resulted in an incomplete and disputed factual record. The unique federal question presented in this case is one of first impression despite any split of authority on related issues of greater and lesser included offenses. Harrison has not shown that the unique circumstances and question that arose in his case are likely to be repeated. For all these reasons, certiorari is inappropriate in this case.

Respectfully submitted,

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