Supreme Court of Ohio Clerk of Court - Filed March 03, 2016 - Case No. 2010-0854

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *Plaintiff-Appellee,* -vs- ANTHONY KIRKLAND, *Defendant-Appellant.*	Case No. 2010-0854 **This is a Death Penalty Case.**

MOTION FOR ORDER OR RELIEF
Pursuant to S.Ct.Prac.R. 4.01

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MOTION FOR ORDER OR RELIEF

Anthony Kirkland, pursuant to S.Ct.Prac.R. 4.01, respectfully moves the Court to vacate his death sentence and remand the matter to the trial court for a new sentencing hearing consistent with Kirkland's right to a jury trial. *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 624 (2016). This Court determined that the prosecutorial misconduct during the penalty phase of Kirkland's trial was "substantially prejudicial." *State v. Kirkland*, 140 Ohio St. 3d 73, 87, 15 N.E.3d 818, 834 (2014). But rather than remand for a new penalty phase with a jury, the majority of this Court conducted its own independent evaluation to determine whether Kirkland deserved a death sentence. *Id.* at 87. The Supreme Court's recent opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), makes clear that the Sixth Amendment requires the defendant's death sentence to be based on a jury verdict, not a judge's factfinding. *Id.* at 624 ("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."). Accordingly, a death sentence rendered by this Court is unconstitutional, and this Court must remand to the trial court for a new penalty phase.

This argument is more fully laid out in the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

Anthony Kirkland exercised his right to a jury trial, but the State's misconduct deprived him of a fair penalty phase. *State v. Kirkland*, 140 Ohio St. 3d 73, 87 (2014) ("[W]e find that the state's closing remarks in the penalty phase were improper and substantially prejudicial.") This Court recognized that Kirkland was deprived of his right to a fair trial in the penalty phase. But instead of remanding for a new penalty phase trial with a jury, a majority of this Court determined it could use its "own independent evaluation of the capital sentence, and that evaluation can cure errors in penalty-phase proceedings." *Id.* at 87. This Court then independently determined that Kirkland deserved the death penalty. *Id.* at 98.

I. *Hurst* makes clear that the "cure" applied to the violation of Kirkland's constitutional rights was itself another constitutional violation.

The Supreme Court in *Hurst v. Florida*, decided on January 12, 2016, confirmed what has been clear since the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000): The Sixth and Fourteenth Amendments require that a jury, rather than a judge, find every fact necessary to impose a death sentence. *Hurst*, 136 S. Ct. at 619. The Sixth Amendment demands a jury determination of those issues, and the State of Ohio may not substitute a court determination in its place.

When the prosecutor's misconduct is deemed prejudicial and deprives a defendant of his right to a fair penalty phase, the remedy is a new penalty phase. *See Berger v. United States*, 295 U.S. 78, 89 (1935) ("Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.") At that point, the defendant still retains his Sixth Amendment right to have a jury determine his sentence. *Hurst* now makes clear

that the independent review and conclusion reached by the majority of this Court violated Kirkland's Sixth Amendment rights. *Hurst,* 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.") The jury's determination was invalidated, and the findings of four justices could not replace the "jury's verdict." *Id.* at 624 ("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.").

A defendant whose rights have been substantially, prejudicially affected, cannot have his rights to a fair trial restored by the independent review of an appellate court. Three of this Court's Justices recognized that, even before the Supreme Court's decision in *Hurst*. *Kirkland*, 140 Ohio St. 3d 73, 99-109. As Justice Lanzinger explained:

> While R.C. 2929.05(A) provides that we must conduct an independent evaluation of the death sentence, we should not conduct this evaluation when the sentence was recommended by a jury that was exposed to substantial and prejudicial prosecutorial misconduct. We have typically used our independent evaluation of the death sentence to correct errors of law by the trial court in its sentencing opinion. See, e.g., State v. Lang, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 298 State v. Fox, 69 Ohio St.3d 183, 191, 1994 Ohio 513, 631 N.E.2d 124 (1994). By declining to remand this case, the majority fails to preserve the unique role of the jury in capital cases.

Id. at 106 (Pfeiffer, J., concurring in her opinion). Justice O'Neill also expressed his opinion that "curing" prejudicial penalty-phase prosecutorial misconduct with the Court's independent review "undermines the very foundation of the jury system in Ohio. And it does not comport with the Sixth Amendment to the United States Constitution, which in this context requires that the facts permitting the imposition of a death sentence must be found by a jury." *Id.* at 107-108.

This Court's decision in Kirkland was made without the benefit of *Hurst. Hurst* instructs that the jury's function cannot be usurped by judges' independent review.

II. *Hurst* affects the case law on which the validity of such "independent reweighing" relies.

Hurst has a significant impact on *Clemons v. Mississippi*, 494 U.S. 738 (1990). Previously, *Clemons v. Mississippi*, 494 U.S. 738 (1990) provided guidance about the constitutionality of independent reweighing. But the language in *Clemons* is telling, in light of *Hurst*:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. *Cabana v. Bullock*, 474 U.S. 376 (1986), held that an appellate court can make the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982), in the first instance and stated that "[t]he decision whether a particular punishment -- even the death penalty -- is appropriate in any given case is not one that we have ever required to be made by a jury." 474 U.S., at 385.

Clemons, 494 U.S. at 745-46. There is no reconciling *Hurst*'s holding with *Clemons*. *Compare Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death;") with *Clemons*, 494 U.S. at 745 ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."). *See also* Justice O'Neill's dissent in this case. 140 Ohio St. 3d at 108.

Moreover, the Supreme Court explicitly overruled in *Hurst* the important cases on which *Clemons* relies. In *Clemons*, the Court stated:

> *Spaziano v. Florida*, 468 U.S. 447 (1984), ruled that neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence; neither is there a double jeopardy prohibition on a judge's override of a jury's recommended sentence. Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of

> capital punishment, *Hildwin v. Florida*, 490 U.S. 638 (1989), nor does it require jury sentencing, even where the sentence turns on specific findings of fact. *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).

Clemons, 494 U.S. at 746. But the Court in *Hurst* just "expressly overrule[d] *Spaziano* and *Hildwin* in relevant part," and found that "[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*." 136 S. Ct. at 623, 624.

This Court has relied upon *Clemons*' authority to cure errors with its independent reweighing. The supporting cases cited by the majority of this Court in *Kirkland—State v. Hale*, 119 Ohio St. 3d 118, 142 (2008), *State v. Sanders*, 92 Ohio St. 3d 245, 267 (2001), and *State v. Mills*, 62 Ohio St. 3d 357, 373-74 (1992)—all lead back to a reliance on *Clemons.*[1] Kirkland currently takes no position on whether independent reweighing is appropriate in cases when the errors were not deemed "substantially prejudicial" like they were in Kirkland's case. But *Hurst*'s effect in a case like Kirkland's is inescapable: when the defendant invoked his right to a jury trial and then was deprived his right to a fair penalty phase, the only constitutional remedy is a new, fair, penalty phase at which the jury can decide his fate.

CONCLUSION

When this Court decided *Kirkland*, it did not have the benefit of the Supreme Court's Sixth Amendment analysis in *Hurst.* Kirkland invoked his right to a jury trial, and the

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[1]*Hale* relied upon *State v. Bays*, 87 Ohio St.3d 15, 30-31 (1999), in which this Court stated, "The errors noted in this proposition can be cured by this court's independent review. ***See, generally, Clemons v. Mississippi***." *Mills* relied upon *State v. Landrum*, 53 Ohio St. 3d 107, 115 (1990), in which this Court stated, "We have considered Coffenberger's proffered testimony in our independent assessment and weighing of evidence mandated by R.C. 2929.05(A). ***See Clemons v. Mississippi***." *Sanders* relied upon *State v. Williams*, 74 Ohio St. 3d 569, 578 (1996), which relied upon a variety of cases such as *Landrum* (see above) and *State v. Combs* (1991), 62 Ohio St. 3d 278, 286 (1991)("Indeed, it is within the province of this court to conduct its own careful appellate reweighing of aggravating circumstances against mitigating factors to produce a 'measured consistent application' of the death penalty which would be in no way unfair to the defendant. ***Clemons v. Mississippi*, supra**.") In other words, all roads lead back to *Clemons.*

prosecutor's misconduct "substantially prejudiced" him and denied him a fair trial. That constitutional violation cannot be remedied by the findings of four of this Court's Justices. *See Hurst*, 136 S. Ct. at 624 ("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.").

The appropriate remedy is to remand the case to the trial court for a new sentencing hearing, one that is free from the taint of pervasive prosecutorial misconduct. For the reasons stated, Kirkland moves the Court to issue an Order vacating his death sentence and remanding the matter to the trial court to conduct a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing Motion for Order or Relief on counsel for the State of Ohio at the address listed below via ordinary U.S. Mail, postage prepaid, on this 3rd day of March, 2016:

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