

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2010-0854
Plaintiff-Appellee	:	This is a death penalty case
vs.	:	
ANTHONY KIRKLAND	:	
Defendant-Appellee	:	

MEMORANDUM IN RESPONSE TO ORDER OR RELIEF
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MEMORANDUM

On May 13, 2014, this Court released its opinion affirming Appellant Kirkland's conviction and sentence. *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966. On March 3, 2016, appellant filed a motion for order or relief, and appellee received this document on March 8, 2016.

The appellant's argument centers on this Court's finding upholding the appellant's third proposition of law. The appellant's position is that since this Court found that the prosecutor's closing argument was improper and prejudicial, that this Court should follow the holding in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016) and remand this case to the trial court for a new sentencing hearing.

As discussed below, the recent United States Supreme Court's holding in *Hurst* has no applicability to the issue raised in Appellant's pleading. But this Court need not address the merits of Appellant's motion. Since Appellant is relying on a new United States Supreme Court decision decided a few months ago, he must get past the threshold issue of retroactivity. *United States v. Teague*, 490 U.S. 1031, 1072, 109 S. Ct. 1771. In *Teague*, a new rule should only apply retroactively if it (1) places "certain kinds of primary, private, individual conduct beyond the power of the criminal law-making authority to prescribe," or (2) it is reserved for watershed rules of criminal procedure. *United States v. Teague*, 490 U.S. 1031, 1075-1076.

The decision in *Hurst* places no individual conduct beyond the power of the legislature to prescribe. The first exception therefore is not relevant here. Second, *Hurst* concerns very specific procedures in Florida law pertaining to capital sentencing proceedings; it does not contemplate watershed changes implicit in the concept of ordered liberty.

Moreover, *Hurst* does not remotely apply to Ohio's capital sentencing scheme or the issue raised in Appellant's motion. *Hurst v. Florida*, *supra*, held that Florida's capital sentencing

scheme was unconstitutional because it violated a capially charged defendant's Sixth Amendment right to trial by jury because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Hurst v. Florida*, 136 S. Ct. 616, 622. The *Hurst* Court noted that the Sixth Amendment required Florida to base defendant Hurst's death sentence on a jury verdict, not a judge's factfinding. The fundamental constitutional flaw in Florida's sentencing scheme was that it "required the judge *alone* to find the existence of an aggravating circumstance" before a death sentence could be imposed. *Hurst v. Florida*, 136 S. Ct. 616, 623.

Ohio's capital sentencing scheme is not constitutionally flawed under the Sixth Amendment simply because, unlike Florida, Ohio bases a capially charged defendant's death sentence on a jury verdict, not a judge's factfinding. Under R.C. 2929.03(D)(2), a *jury* determines "whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case." A jury must make that finding before recommending a sentence of death. R.C. 2929.03(D)(2). Since Ohio's capital sentencing scheme requires the jury to make the critical findings necessary to impose the death penalty, it does not run afoul of the Sixth Amendment like Florida's statute.

CONCLUSION

For the reasons stated, appellant's motion should be denied.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Rachel Troutman (0076741), Elizabeth Arrick (0085151), Assistant State Public Defenders, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215-2998, counsel of record, this 10th day of March, 2016.



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