Supreme Court of Ohio Clerk of Court - Filed May 12, 2016 - Case No. 2010-0854

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	:	

MOTION FOR RECONSIDERATION PURSUANT TO S.CT.PRAC.R. 18.02

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MOTION FOR RECONSIDERATION

The State of Ohio, pursuant to S.Ct.Prac.R.18.02, moves this Court to reconsider its decision granting Appellant Kirkland's motion for order or relief and remanding this case for a new mitigation and sentencing hearing. Kirkland's motion for order or relief was based entirely on the United States Supreme Court's holding in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). This Court recently in *State v. Belton*, 2016-Ohio-1581, ¶'s 59-60, held that *Hurst* does not apply to Ohio's death penalty procedures. In the alternative, the State seeks clarification from this Court whether its remand was based on state or federal legal grounds. The State's argument is more fully set forth in the memorandum below.

Respectfully,

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MEMORANDUM

On May 13, 2014, this Court released its opinion affirming Appellant Kirkland's convictions and death sentence. *State v. Kirkland,* 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966. On March 3, 2016, Kirkland filed a motion for order or relief premised exclusively on *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). On May 4, 2016, this Court summarily without opinion granted Kirkland's motion and remanded this case for a new mitigation and sentencing hearing. The State seeks reconsideration, or in the alternative, clarification from the Court on whether state or federal law served as the basis for granting Kirkland a new mitigation and sentencing hearing.

In Kirkland's motion for order or relief, he relied entirely on *Hurst v. Florida*, supra. Specifically, Kirkland argued that since this Court found that the prosecutor's penalty-phase closing argument was improper <u>and</u> prejudicial, that *Hurst* mandated that this case be remanded for a new mitigation and sentencing hearing. Kirkland also makes the broad assertion that appellate court re-weighing in capital cases is no longer constitutionally permissible under *Hurst*.

In *Hurst*, the Supreme Court of the United States held that Florida's death sentencing procedures violated the Sixth Amendment right to trial by jury under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

Recently, this Court held that Ohio's death penalty scheme does **not** run afoul of *Hurst*:

> Ohio's sentencing scheme is unlike the issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03 (D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St. 3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929. 03(D)(2).

> Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found death-eligible, then subsequent reweighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. **Weighing is *not* a fact-finding process subject to the Sixth Amendment because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination."** (citations omitted) (emphasis added).

State v. Belton, 2016-Ohio-1581, ¶'s 59-60. In fact, the *Hurst* majority only overruled "*Sapziano* and *Hildwin*… to the extent they allow a sentencing judge to find aggravating circumstances, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Hurst*, 136 S.Ct. at 624. As this Court recognized in Belton, Ohio's capital scheme does not implicate this same issue.

Belton established that in Ohio the jury makes the factual findings, making a defendant death eligible (thus complying with *Ring* / *Hurst*) at the guilt phase, and well before the jury convenes in the penalty phase to weigh the aggravating and mitigating factors. *Belton*, at ¶ 59-60. As the federal courts have recognized, *Ring* "has never been extended… to juries weighing of aggravating and mitigating factors" because "that process constitutes not a factual determination, but a complex moral judgment." *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013) (citing federal cases). More to the point, the Sixth Circuit *en banc* panel refused to extend *Ring* when applying the federal death penalty statutory scheme, because (like Ohio) a defendant is "already 'death eligible' once the jury found beyond a reasonable doubt that… two statutory factors were present" and "did not need to find any additional facts in order to recommend that [he] be sentenced to death." *See also*, *U.S. v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc) *Hurst* obviously has no application in Ohio, thus cannot form the basis for Kirtland's

inexplicable grant of relief, and this Court should continue to adhere to *Belton*'s persuasive and unassailable logic.

This is consistent with previous case law. In *State v. Hoffner*, 102 Ohio St. 3d 358, 811 N.E.2d 48, 2004-Ohio-3430, at ¶'s 64-71 this Court concluded that *Ring* "has no possible relevance to Hoffner's case, or to Ohio's death penalty statute," because unlike Arizona's law, under which the trial court was solely responsible for making all factual determinations regarding whether a defendant is death eligible, Ohio's capital-sentencing scheme places that responsibility with the jury.

If this Court remanded Kirkland's case for a new sentencing and mitigation hearing based on *Hurst*, this appears to violate this Court's prior decisions finding that *Hurst* is not applicable to Ohio's death penalty procedures. Moreover, as this Court made clear in *Belton*, re-weighing the mitigating and aggravating circumstances is constitutionally permissible under *Hurst*. It defies belief that the United States Supreme Court in *Hurst* would overrule, or even restrict, its seminal case of *Clemons v. Mississippi*, 494 U.S. 738 (1990), which allows for reweighing to cure errors of constitutional import, without bothering to mention, or even cite, that decision.

Another possible issue in this case is whether this Court can apply *Hurst*, supra retroactively. Assuming *arguendo* that this Court applied *Hurst* in granting Kirkland a new sentencing and mitigation hearing, the State submits that this was improper because the holding in *Hurst* should not be applied retroactively to Kirkland's case. Kirkland's direct appeal was decided by this Court prior to the United States Supreme Court's decision in *Hurst*. Thus retroactivity is a threshold issue. In its response to Kirkland's motion, the State previously relied on *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. Moreover, the Supreme Court held that *Ring v. Arizona*, a case that *Hurst* entirely hinges upon, was not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) ("*Ring*'s holding is properly classified as procedural."). If *Ring* is the unquestionable genesis of *Hurst*, and *Ring* was not retroactive, *Hurst* certainly cannot be.

The State noted that the decision in *Hurst* places no individual conduct beyond the power of the legislature to prescribe. And, since *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. Under the holding in *Teague*, *Hurst* cannot be applied retroactively.

Moreover, in *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546 (2006), the United States Supreme Court held that the failure to submit a sentencing factor to the jury is not structural error and is subject to a harmless error analysis. *Recuenco* is significant because it also held that whether a federal rule is subject to harmless error analysis is a federal question. *Washington v. Recuenco*, 548 U.S. at 217, 126 S.Ct. at 2550. The legal effect of *Recuenco* is that issues involving sentencing errors under the Sixth Amendment involve a federal question, which gives the United States Supreme Court jurisdiction to hear a case where a state court rules in favor of a criminal defendant.

In sum, the State requests this Court to reconsider its decision remanding this case for a new mitigation and sentencing hearing because: (1) recent case law from this Court makes clear that *Hurst* does not apply to Ohio's death penalty procedure and (2) the effect of this Court's decision is to overrule *Belton* and *Hoffner sub silentio*. In the alternative, the State requests this

Court to clarify whether it based remand on federal or state law. This distinction is critical. If this Court's decision is based on federal law, which it appears to be, the State has the right to pursue an appeal in the United States Supreme Court.

CONCLUSION

For the reasons stated, the State's reconsideration motion should be granted. In the alternative, the State seeks clarification from this Court on whether it remanded this matter under federal or state law grounds.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Motion for Reconsideration, 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 12th day of May, 2016.

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