

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	Case No. 97-1474
)	
Plaintiff,)	
)	
v.)	
)	
BOBBY T. SHEPPARD,)	
)	
Defendant.)	<u>THIS IS A DEATH PENALTY CASE</u>

MOTION FOR ORDER OR RELIEF
Pursuant to Supreme Court Rule of Practice 4.01

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MOTION FOR ORDER OR RELIEF

Bobby Sheppard respectfully moves the Court, under Supreme Court Rule of Practice 4.01, to vacate his death sentence and remand the matter to the trial court for a new sentencing hearing consistent with Sheppard's Sixth Amendment right to a jury trial.

This Court determined that the prosecutor committed prejudicial misconduct during the penalty phase of Sheppard's case in "asserting that the defense was underhanded by not entering a plea of not guilty by reason of insanity." *State v. Sheppard*, 84 Ohio St. 3d 230, 239 (1998). Rather than remand for a new penalty phase with a jury, however, this Court conducted its own independent evaluation to determine whether Sheppard deserved a death sentence. *Id.* ("Nonetheless, this court's independent sentence assessment cures the effect of this sentencing error.").

The United States Supreme Court's recent opinion in *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 624 (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. *See State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements).

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

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

Bobby Sheppard exercised his right to a jury trial, but the State's misconduct deprived him of a fair penalty phase. *State v. Sheppard*, 84 Ohio St. 3d 230, 239 (1998). This Court recognized that Sheppard 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, this Court determined that its "independent sentence assessment cures the effect of this sentencing error." *Id.* This Court then independently determined that Sheppard deserved the death penalty. *Id.* at 241.

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

In *Hurst*, decided on January 12, 2016, the Supreme Court of the United States confirmed what has been clear since it 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. This Court has held that the facts necessary to impose a death sentence under "Ohio's capital sentencing scheme" include "the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *State v. Hoffner*, 102 Ohio St. 3d 358, 2004-Ohio-3430 ¶ 69 (citing Ohio Rev. Code § 2929.03(B) and (D)). And Ohio law "charges the jury with determining" those facts "by proof beyond a reasonable doubt." *Id.* The Sixth Amendment thus 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 "sentencing error" because it prejudicially 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). 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 this Court violated Sheppard'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 the Justices of this Court 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 like Sheppard whose rights have been prejudicially affected cannot have his rights to a fair trial restored by the independent review of an appellate court. *Hurst*, 136 S. Ct. at 619. Three of this Court's Justices recognized that, even before the Supreme Court's decision in *Hurst*, in an analogous case. *State v. 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.

In line with this reasoning, which the Supreme Court's *Hurst* decision later proved to be correct, this Court granted Kirkland's motion for order or relief and remanded his case for a new

penalty phase trial. *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements). *Hurst* and this Court’s recent order in *Kirkland* establish that the jury’s function cannot be usurped by judges’ independent review.

II. *Hurst* affects the case law on which the validity of “independent reweighing” as error correction relies.

Hurst has a significant impact on *Clemons v. Mississippi*, 494 U.S. 738 (1990). Previously, *Clemons* 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 745–746. 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 *Kirkland*, 140 Ohio St. 3d at 108 (O’Neill, J., dissenting).

Moreover, in *Hurst*, the Supreme Court explicitly overruled the important cases on which *Clemons* relies. In *Clemons*, the Court had 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 in *Hurst*, the Court “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*.” *Hurst*, 136 S. Ct. at 623, 624.

This Court has relied upon *Clemons*'s authority to cure errors with its independent reweighing. In Sheppard's case, this Court cited *State v. Landrum*, 53 Ohio St. 3d 107, 124-26 (1990), in support of its decision that the independent sentence assessment cured the effect of the prosecutorial misconduct. *Sheppard*, 54 Ohio St. 3d at 239. *Landrum*, in turn, relied directly on *Clemons* to support its holding that the Court's independent review and weighing of the evidence “rectified any errors” in the case. *Landrum*, 53 Ohio St. 3d at 124.

Following *Hurst*, it is clear that appellate reweighing can no longer be used to rectify the type of error that took place in Sheppard's case. *Hurst*'s effect in a case like Sheppard'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 in accordance with the Sixth Amendment.

CONCLUSION

When this Court decided Sheppard's case, it did not have the benefit of the Supreme Court's Sixth Amendment analysis in *Hurst*. Sheppard invoked his right to a jury trial, and the prosecutor's misconduct was prejudicial sentencing-stage error that denied him a fair trial. That constitutional violation cannot be remedied by the findings 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. *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements).

For the reasons stated, Sheppard 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 a true copy of the foregoing was sent via first class, United States mail, to Joseph T. Deters and Ronald W. Springman, Jr., Assistant Prosecuting Attorney, Hamilton County, Ohio, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 13th day of May, 2016.

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