

IN THE SUPREME COURT OF OHIO

STATE OF OHIO) Case No. 1998-0019
)
 Plaintiff,)
)
 v.)
)
 ANGELO FEARS,)
)
 Defendant.) THIS IS A DEATH PENALTY CASE

MOTION FOR STAY OF EXECUTION PENDING DETERMINATION OF
THE APPLICABILITY OF *HURST* TO ANGELO FEAR'S DEATH
SENTENCE

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MOTION FOR STAY OF EXECUTION

Angelo Fears respectfully moves the Court to **stay his execution set for June 27, 2018** pending determination of the applicability of *Hurst v. Florida*, 136 S. Ct. 616 (2016) to his case. The Court determined in Fears' direct appeal that the trial court failed to properly merge duplicative aggravating circumstances. *State v. Fears*, 1999-Ohio-111, 86 Ohio St. 3d 329, 344, 715 N.E.2d 136, 151. Rather than remand for a new penalty phase hearing for a jury to determine whether the correct number of aggravating circumstances outweighed the mitigating factors, the Court conducted an independent evaluation to determine whether Fears deserved a death sentence. *Id.* The Court also found several instances of improper prosecutorial misconduct during the penalty phase proceedings, *id.* at 332-36, but then "cured" this error through the Court's independent evaluation and reweighing of aggravating and mitigating circumstances. *See Fears v. Bagley*, 462 F. App'x 565, 572 (6th Cir. 2012).

The United States Supreme Court's recent opinion in *Hurst v. Florida* makes clear that the Sixth Amendment requires a defendant's death sentence to be based on a jury verdict, not a judge's factfinding. *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."). Accordingly, a death sentence rendered by this Court's factfinding during the independent evaluation is unconstitutional because it negates the jury's

own factual determination that the aggravating circumstances outweigh the mitigating factors. Here, the independent review conducted by this Court to cure trial court errors and multiple instances of improper prosecutorial misconduct violated Fears' right to trial by jury under the Sixth Amendment. The Court's recent decision in *Kirkland* requires this Court to review Angelo Fears' case in light of the Supreme Court of the United States' decision in *Hurst* and to vacate his death sentence and remand to the trial court for a new penalty phase hearing consistent with Fears' right to a fair and reliable sentencing determination at the penalty phase. *See State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2016 Case Announcements).

Accordingly, Mr. Fears requests a stay of execution for this Court to determine the applicability of *Hurst* to his case. Mr. Fears meets the "cause and prejudice" standard as he would be undeniably prejudiced if this Court did not determine the application of *Hurst* to his case before his execution because success would render his death sentence unconstitutional. *See State v. Steffen*, 1994-Ohio-111, 70 Ohio St. 3d 399, 412, 639 N.E.2d 67, 77. Moreover, Mr. Fears meets the cause prong because, although he raised and preserved these errors in his appeals and federal habeas proceedings, for the first time *Hurst* now clarifies that a reviewing court cannot cure sentencing errors in a capital case. As such, a stay of execution is proper in this case. This argument is more fully laid out in the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

On March 30, 1997, James Grant and Angelo Fears robbed a group of men dealing crack cocaine in Cincinnati, Ohio. During the robbery, Mr. Fears, who is borderline intellectually disabled, was highly intoxicated and attempting to hold two guns at the same time. According to one of the witnesses, one of the guns just “went off.” One shot was fired, fatally wounding Antwuan Gilliam in the left temple. Angelo Fears exercised his right to a jury trial and was convicted of aggravated murder but the State’s misconduct deprived him of a fair and reliable sentencing determination at the penalty phase under Art. I, §§ 9, 10, 16 and the Fifth, Sixth, Eighth and Fourteenth Amendments. *State v. Fears*, 1999-Ohio-111, 86 Ohio St. 3d 329, 331, 715 N.E.2d 136, 143. On direct appeal, the Court recognized that Fears was deprived of his right to a fair trial in the penalty phase. Instead of remanding for a new penalty phase trial with a jury, however, this Court conducted its own independent evaluation to “cure” the sentencing errors. As such, this Court, rather than a jury, determined that Fears deserved the death penalty. The use of appellate reweighing to cure these sentencing errors violated Fears’s right to trial by jury under the Sixth Amendment as articulated in *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

I. The trial court made numerous errors that were “cured” through the Court’s independent evaluation.

A. The trial court failed to merge duplicative aggravating circumstances prior to the penalty phase.

At Mr. Fears’ penalty phase proceedings, the jury considered three specifications: kidnapping, aggravated robbery and aggravated burglary—along with the associated evidence—to find Fears eligible for the death penalty. *State v. Fears*, 715 N.E.2d at 143. On appeal, this Court concluded that “the offenses of kidnapping and aggravated robbery were committed with no separate animus, as there is no showing of a prolonged restraint, significant asportation, or secret confinement of the victims. Therefore, we agree with appellant that the kidnapping specification merges with the aggravated robbery specification.” *Id.* at 151. Rather than grant Fears a new sentencing hearing, however, this Court upheld Fears’ death sentence through the use of appellate reweighing. *Id.* (explaining that “we find, in our independent review, that the remaining aggravating circumstances outweigh the mitigating circumstances, we conclude that appellant need not be resentenced.”). Because of the trial court’s failure to merge prior to the penalty phase, the jury improperly considered duplicative aggravating circumstances when finding that the aggravating circumstances outweighed the mitigating factors.

B. Multiple instances of improper prosecutorial misconduct infected Mr. Fears’ trial.

On direct appeal this Court also found five instances of improper prosecutorial misconduct during Mr. Fears’ trial. *Id.* at 143-46. The Ohio Supreme

Court specifically noted their concern with the many instances of improper prosecutorial misconduct in Mr. Fears' case. *Id.* at 146 (“[W]e are greatly disturbed by Prosecutor Russell's and Prem's lack of restraint and their willingness to utter such inflammatory remarks”) and *id.* at 143 (“[W]e express our deep concern over some of the remarks and misstatements made by the prosecutors involved in this case.”). After finding these statements to be improper, the Court conducted an independent review of Fears' sentence in which the instances of prosecutorial misconduct were cured by reweighing the aggravating and mitigating circumstances. *See Fears*, 462 F. App'x at 572. However, as Chief Justice Moyer noted in his concurrence and dissent, “the seriousness of the prosecutorial misconduct already addressed is sufficient to support a reversal of the death penalty and a remand for resentencing.” *Id.* at 162.

II. *Hurst* makes clear that the “cure” applied to the violations of Fears' constitutional rights was itself another constitutional violation.

In *Hurst*, decided on January 12, 2016, the United States Supreme Court confirmed what has been clear since it decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000): the Sixth and Fourteenth Amendments require a jury, rather than a judge, to find every fact necessary to impose a higher sentence. *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.”). 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, 811 N.E.2d 48, ¶69 (citing Ohio Rev. Code § 2929.03(B) and (D)). Moreover, Ohio law “charges the jury with determining” those facts “by proof beyond a reasonable doubt.” *Id.*

Accordingly, by statute, Ohio’s capital scheme considers the weighing decision to be factfinding made by the jury or three judge panel. *See State v. Hoffner*, 811 N.E.2d at ¶70 (explaining that “the jury made the *required factual findings* regarding the existence of statutory aggravating circumstances *and further found* that the aggravating circumstances outweighed the factors in mitigation beyond a reasonable doubt.” (emphasis added)). The decision in *Hurst* now makes clear that the Sixth Amendment demands that a jury determine these issues and this Court may not substitute its own determination in its place.

A. The jury impermissibly considered duplicative aggravating circumstances in their sentencing determination.

Fears has a Sixth Amendment right to have a jury determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The jury’s sentencing determination that the aggravating circumstances outweighed the mitigation evidence was invalidated by the jury’s consideration of duplicative aggravating circumstances and associated evidence. This Court specifically found that the kidnapping specification should have been merged with the aggravated robbery specification prior to the penalty phase. *Id.* at 343-44. However, the Court then found that resentencing was not required and, in its

independent review, the remaining aggravating circumstances outweighed the mitigating circumstances. *See State v. Fears*, 715 N.E.2d at 151. *Hurst* now makes clear that this appellate reweighing violated Fears' right to trial by jury because the findings of the Justices of this Court cannot replace the jury's verdict. *Hurst*, 136 S. Ct. at 624. The jury in Fears' case never made a determination that the correct number of aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. That finding was made for the first time on Fears' direct appeal to this Court. This judicial factfinding violated Mr. Fears' Sixth Amendment right to trial by jury. *Hurst*, 136 S. Ct. at 619.

B. Prosecutor's misconduct deemed to be a sentencing error cannot be cured by appellate reweighing under *Hurst*.

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). In Fears' case, the prosecutor's statements mislead the jury as to critical evidence regarding the aggravating circumstances, specifically that the nature and circumstances of the offense should be weighed against mitigating evidence and the suffering and mental anguish of the victim was an aggravating circumstance. *State v. Fears*, 715 N.E.2d at 143-44. The prosecutor also made statements that impermissibly construed mitigating evidence and denigrated the defense such as claiming the defense's psychological expert was being paid with taxpayer money, the expert was the defendant's "mouth piece" and further accusing the expert of wrongdoing and

withholding pertinent information. *Id.* at 144-45.¹ This Court found these statements to be improper prosecutorial misconduct. Rather than remanding for a new penalty phase hearing, the Court cured such errors by reweighing the aggravating and mitigating circumstances. By doing so, the Court substituted its judgment for the jury's verdict. Thus, a jury has never made a determination that the aggravating circumstances outweigh the mitigating factors absent the impact of multiple egregious and improper statements by the prosecutor.

A defendant like Fears whose rights have been prejudicially affected cannot have his rights to a fair and reliable sentencing determination at the penalty phase restored by the independent review of an appellate court. *Hurst*, 136 S. Ct. at 619. Three of this Court's Justices recognized this principle, 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

¹ Numerous additional instances of prosecutorial misconduct were dismissed by the Court as not rising to the level of plain error prompting a lengthy dissent by Chief Justice Moyer joined by Justice Pfeiffer. *See State v. Fears*, 715 N.E.2d at 156-63.

(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 107–08. *Hurst* now instructs that such reweighing violates Mr. Fears’ right to have a jury find every fact necessary to impose a death sentence.

In line with this reasoning, this Court granted Anthony Kirkland’s motion for order or relief and remanded his case for a new penalty phase trial in front of a jury. *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2016 Case Announcements). Kirkland’s motion was based on *Hurst* and this Court’s use of appellate reweighing to cure a penalty phase error. *See* Mot. for Order or Relief at 1, *Kirkland v. State of Ohio*, No. 2010-0854 (Ohio Mar. 3, 2016). *Hurst* and this Court’s recent order in *Kirkland* establish that the jury’s function cannot be usurped by judges’ independent review.

III. *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* provided guidance about the constitutionality of

independent reweighing. The holding in *Clemons* is of questionable validity 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.

Id. at 745-46. *Hurst*’s holding cannot be reconciled 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 *State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶199-204 (O’Neill, J., dissenting).

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

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. However, 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 by independent reweighing. See, e.g., *State v. Combs*, 62 Ohio St. 3d 278, 286, 581 N.E.2d 1071 (1991) (rejecting argument that appellate reweighing cannot be used for error correction “where the jury’s deliberations are tainted by prosecutorial misconduct, injection of nonstatutory aggravating circumstances, or other error”); *State v. Lott*, 51 Ohio St. 3d 160, 170–72 (1990) (consideration of invalid aggravating circumstances was sentencing error cured by appellate reweighing). These cases all lead back to reliance on *Clemons*. Following *Hurst*, appellate reweighing can no longer be used to rectify the type of errors that took place in Fears’ case. *Hurst*'s effect on Fears’ case is inescapable: when the defendant invoked his right to a jury trial and was then deprived of his right to a fair and reliable sentencing determination at the penalty phase, the only constitutional remedy is a new, fair,

sentencing hearing at which the jury can decide his fate in accordance with the Fifth, Sixth, Eighth and Fourteenth Amendments.

IV. Mr. Fears is entitled to a stay of execution pending full and fair determination of the applicability of *Hurst* to his case.

In order for this Court to fully consider the impact of *Hurst* on Fears' case, Mr. Fears requests a stay of execution. A petitioner seeking a stay of execution must meet the "cause and prejudice" standard the Supreme Court of the United States adopted in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991). *See Steffen*, 639 N.E.2d at 77. Under this standard, the petitioner must show "some objective factor external to the defense impeded counsel's efforts to raise the claim in his prior petition." *Id.* at 76 (citing *McCleskey*, 499 U.S. at 493). As relevant here, "a showing that the factual or legal basis for the claim was not reasonably available...could constitute such just cause. *Id.* (citing *McCleskey*, 499 U.S. at 493-94). "After the petitioner has shown such cause, he must then show actual prejudice flowing therefrom." *Id.* (citing *McCleskey*, 499 U.S. at 494).

Mr. Fears meets both prongs of the "cause and prejudice" standard. First, Mr. Fears would be undeniably prejudiced if this Court never determined the applicability of *Hurst* to his case before his execution, particularly when success on this issue would render his death sentence unconstitutional. As outlined in detail above, Mr. Fears cannot have his right to have a jury determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt restored by the independent review of an appellate court. *See Hurst*, 136 S.

Ct. at 619. Moreover, Fears also satisfies the cause prong because *Hurst* was not available before he completed his state direct appeal, post-conviction and federal habeas corpus reviews. The Supreme Court of the United States did not decide *Hurst* until January 12, 2016 and this Court just issued relief in *Kirkland* on May 4, 2016 – years after Mr. Fears closed his state and federal appeals. Although Fears has consistently raised and preserved the issue of duplicative aggravating circumstances and prosecutor misconduct, the courts have consistently upheld this Court’s reweighing through independent review to cure these errors. *Hurst* now compels a finding that such reweighing is a violation of Fears’ Sixth Amendment right to a jury trial.

Therefore, it is appropriate to stay Mr. Fears’ execution pending his opportunity for this Court to consider the applicability of *Hurst* to his case and determine whether his death sentence must be vacated and case remanded for a new penalty phase hearing.

CONCLUSION

When this Court decided Fears’ case, it did not have the benefit of the Supreme Court’s Sixth Amendment analysis in *Hurst*. Fears invoked his right to a jury trial. Subsequently, the trial court erred by failing to merge duplicative aggravating factors. The jury weighed this extra aggravator in its sentencing calculus. The jury in Fears’ case never made a determination that the proper aggravating circumstances outweighed the mitigating factors. Moreover, the prosecutor’s prejudicial misconduct at the penalty phase denied Fears a fair and

reliable sentencing determination by the jury. These constitutional violations cannot be remedied by this Court's independent review. *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 stay Mr. Fear's execution until this Court has the opportunity to determine the applicability of *Hurst* to his case. As *Kirkland* directs, the *Hurst* violations in Mr. Fears' case require vacating Mr. Fears' death sentence and remanding the case to the trial court for a new sentencing hearing - one that is free from the effect of considering duplicative aggravators and the taint of pervasive prosecutorial misconduct. *See State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2016 Case Announcements).

For the reasons stated, Fears moves the Court to issue an Order granting his stay of execution, 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 on May 17, 2016 a copy of the foregoing was sent via first class, United States mail, to Ronald W. Springman, Jr., 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Counsel for Plaintiff State of Ohio.

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