

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 1997-1474
Plaintiff-Appellee	:	This is a death penalty case
vs.	:	
BOBBY T. SHEPPARD	:	
Defendant-Appellant	:	

MEMORANDUM IN OPPOSITION TO MOTION FOR ORDER OR RELIEF

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MEMORANDUM

Defendant-appellant Bobby Sheppard requests this Court to vacate his death sentence and order a new sentencing hearing based upon *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). The State opposes Sheppard's motion for two reasons: (1) this Court has already decided that *Hurst* does not apply to Ohio's death penalty scheme (*State v. Belton*, 2016-Ohio-1581, ¶'s 59-60); and (2) *Hurst* does not apply retroactively to Sheppard's case.

As a threshold issue, Sheppard's motion is essentially a motion for reconsideration. It requests this Court to reconsider issues of prosecutorial misconduct that were already addressed by this Court in Sheppard's original appeal. Sheppard is well past the time limit under this Court's rules to seek reconsideration. *See* S.Ct.Prac.R. 18.02(D) The State therefore requests this Court to deny Sheppard's motion as an untimely motion for reconsideration.

This Court has *definitively* decided that *Hurst* does not apply to Ohio's death penalty scheme. 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, 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.

Moreover, as this Court made clear in *Belton*, re-weighting 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.

Interestingly, Sheppard has failed to cite, much less distinguish *Belton*. This Court has made it plainly clear that *Hurst* does not apply to Ohio's death penalty scheme.

Another issue is whether this Court can apply *Hurst*, *supra* retroactively. The State submits that *Hurst* should not be applied retroactively to Sheppard's case. Sheppard'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 *United States v. Teague*, 490 U.S. 1031, 1072, 109 S. Ct. 1771, 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 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 deny Sheppard's motion because: (1) recent case law from this Court makes clear that *Hurst* does not apply to Ohio's death penalty procedure; and (2) *Hurst* does not apply retroactively.

CONCLUSION

For the reasons stated, the State requests this Court to deny Sheppard's motion for order or relief.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Opposition, by United States mail, addressed to Michelle N. Eiler (0093518), Associate Attorney, Scott & Nolder Co., LPA, 65 East State Street, Suite 200, Columbus, Ohio 43215, this 23rd day of May, 2016.

/s/Philip R. Cummings _____
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