

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	Case No. 1998-0019
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
ANGELO FEARS,)	
)	
Defendant-Appellant.)	<u>THIS IS A DEATH PENALTY CASE</u>

**MOTION FOR LEAVE TO FILE REPLY TO THE STATE'S MEMORANDUM IN
OPPOSITION TO STAY OF EXECUTION**

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Angelo Fears**

MOTION FOR LEAVE TO FILE REPLY

Angelo Fears respectfully requests leave to file a reply to the State’s Memorandum in Opposition to Stay of Execution. The proposed Reply is attached as Exhibit A. On May 17, 2016, Mr. Fears filed a Motion for Stay of Execution pending determination of the applicability of *Hurst v. Florida*, __U.S.__, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016) to his case. On May 23, 2016, the State filed its Memorandum in Opposition, which raised arguments not addressed in Mr. Fears’ original motion, notably the retroactivity of *Hurst* and the applicability of this Court’s decision in *State v. Belton*, 2016-Ohio-1581, 2016 WL 1592786, ¶¶ 59-60. Mr. Fears seeks leave to reply to those unaddressed arguments raised for the first time in the State’s response. This Reply will assist the Court in determining these issues of first impression. As such, good cause exists to allow Mr. Fears to file a Reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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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Exhibit A

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REPLY TO STATE'S MEMORANDUM IN OPPOSITION

On May 17, 2016, Mr. Fears filed a Motion for Stay of Execution pending determination of the applicability of *Hurst v. Florida*, __U.S.__, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) to his case. On May 23, 2016, the State filed its Memorandum in Opposition, which raised arguments not addressed in Mr. Fears' original motion, notably the retroactivity of *Hurst* and the applicability of this Court's decision in *State v. Belton*, 2016-Ohio-1581, 2016 WL 1592786, ¶¶ 59-60. As discussed more fully below, the State's arguments are misplaced and the Court should grant Mr. Fears' stay of execution, vacate his death sentence and remand the matter to the trial court to conduct a new sentencing hearing in light of *Hurst*. See *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2016 Case Announcements).

I. Under *Hurst*, which announced a watershed procedural rule, a reviewing court may not reweigh aggravating circumstances thereby substituting its judgment for that of the jury in capital sentencing.

In its Memorandum in Opposition, the State argues that *Hurst* is not retroactive under *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989) because *Hurst* relies on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002) and if "*Ring* was not retroactive, *Hurst* certainly cannot be." (Mem. in Opp'n at 4) (citing *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)). However, a more careful reading of *Summerlin* shows that the retroactivity analysis applied to *Ring* is inapplicable to *Hurst*.

Fourteen years have passed since the Court's decision in *Ring*, twelve years since its *Summerlin* decision, and on January 12, 2016, the *Hurst* Court expanded its *Ring* holding to such a degree that *Summerlin's* accuracy analysis as applied to *Ring* is inapplicable to *Hurst*. Specifically, the *Hurst* Court addressed the issue of whether a defendant's Sixth Amendment jury trial right is violated where, as in Florida, a judge must hold a separate hearing to determine whether sufficient aggravating circumstances exist to justify a death sentence notwithstanding a penalty phase jury's recommendation to impose death. 136 S.Ct. at 619. The *Hurst* Court held such a sentencing scheme unconstitutional. *Id.*

Florida defended this scheme by, *inter alia*, claiming it complied with *Ring*:

Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance." Brief for Respondent 44. The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge also find an aggravator," Florida concludes, "only provides the defendant additional protection." Brief for Respondent 22.

Id. at 622. The *Hurst* Court declined to accept Florida's logic, noting "the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person **shall** be punished by death." *Id.* (emphasis added). The Court further opined, "[t]he State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."

Id. In other words, where *Ring* dealt only with the propriety of a sentencing judge's finding that a defendant **may** be subject to the death penalty due to the existence of aggravating factors, *Hurst* dealt with a scheme wherein the jury determined the existence of aggravating factors, but the judge ultimately determined their weight relative to mitigation to find either that the defendant shall be put to death, or that he shall not. *Id.* The *Hurst* Court held that such judicial factfinding was an unconstitutional violation of the defendant's Sixth Amendment jury trial right. *Id.* at 624. This holding expanded *Hurst's* reach beyond that of *Ring*.

Hurst's expansion on *Ring* is only retroactively applicable if said expansion creates a procedural rule that is central to an accurate determination that death is a legally appropriate punishment.¹ In Ohio, once a reviewing court determines that a jury's finding that aggravators outweigh mitigators is unreliable, the weight determination is null and void. At that point, life in prison is the maximum sentence the defendant can receive absent a non-defective jury finding that aggravators outweigh mitigators. See R.C. 2929.03(D)(2); *Belton*, 2016-

¹ Having previously determined in *Ring* that the right to trial by jury is implicit in the concept of ordered liberty, the *Summerlin* majority conceded, "[t]he right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them." *Summerlin*, 542 U.S. at 358. Therefore, the Court trained its attention and analysis on the question of whether *Ring* announced a procedural rule central to an accurate determination that death is a legally appropriate punishment. *Id.* at 356-58.

Ohio-1581, at ¶59 (“[I]n 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.”). The reviewing court cannot cure the defect that tainted the jury determination by substituting its judgment for that of the jury without seriously diminishing the accuracy of the defendant’s death sentence. According to *Hurst*, a capitally-charged defendant who invokes the Sixth Amendment jury trial right is entitled to an opportunity to convince just one of twelve individuals that mitigating factors outweigh the aggravating circumstances and that his life therefore should be spared. 136 S.Ct. at 622 (overturning Florida’s death penalty sentencing scheme because “the Florida sentencing statute does not make a defendant eligible for death until “findings *by the court* that such person **shall** be punished by death.”). The defendant’s jury right is equally violated when that twelve-person determination is unceremoniously usurped by the independent reweighing of an appellate court. In that instance, the defendant does not get all of the constitutional protections to which he is entitled when on trial for his life and is instead subject to an impermissibly greater likelihood of receiving death based on odds alone.

In any state that allows reweighing, the act of reweighing is tantamount to the Florida scheme’s act of substituting the factfinding of twelve jurors with that of a sentencing judge. This creates a serious and constitutionally impermissible likelihood that one who is not guilty of death may nevertheless receive a death sentence insofar as the appellate court cannot recreate the differing perspectives

and life experiences that the twelve jurors brought to bear when weighing aggravators versus mitigators at the defendant's original sentencing. A capital jury's expression of the conscience of the community thus provides the link to the community's evolving standards of decency that render a death sentence constitutional under the Eighth Amendment:

[T]he legitimacy of capital punishment in light of the Eighth Amendment's mandate concerning the proportionality of punishment critically depends upon whether its imposition in a particular case is consistent with the community's sense of values. Juries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge. If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's "moral guilt."

Spaziano v. Florida, 468 U.S. 447, 489, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens, Brennan, and Marshall, JJ., dissenting, in pre-*Ring* case upholding Florida's judge override of jury capital sentencing decisions, which *Hurst* subsequently overturned); accord *Gregg v. Georgia*, 428 U.S. 153, 181, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Applied to Fears' case, curative reweighing seriously diminished the accuracy and reliability of his death sentence because the appellate court acting in its capacity to review the case was not the equivalent of twelve common citizens considering and giving varying weight to aggravation versus mitigation. Nor could the reviewing court replicate the variety of ways in which the

prosecutors' improper conduct and comments may have affected each of the twelve jurors when weighing aggravation versus mitigation. As this Court recently noted in its *Belton* decision, "the weighing process amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death eligible." 2016-Ohio-1581, at ¶ 60 (citing *United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013)). This complex moral judgment culminates in the jury's factual finding of whether the aggravating circumstances outweigh the mitigating factors. Accordingly, this Court cannot sufficiently guarantee that the removal of the impermissible aggravator would not have swayed at least one of those twelve jurors, thereby preventing imposition of the death penalty against Mr. Fears. Nor can this Court sufficiently guarantee that the prosecutorial misconduct purportedly cured by appellate review did not affect the jurors' decision to sentence Mr. Fears to death. As such, *Hurst* makes clear that the appellate court's attempt to cure these errors by reweighing the aggravating and mitigating factors cannot replace the jury's determination that Mr. Fears should be executed or not. This procedural rule articulated in *Hurst* is central to an accurate determination that death is a legally appropriate sentence and the rule must be applied retroactively.

II. Additional Supreme Court precedent indicates *Hurst* may be retroactive because it implicates the proof beyond a reasonable doubt standard.

Additional United States Supreme Court precedent lends further support that *Hurst* must be applied retroactively. Under *Apprendi v. New Jersey*, 530 U.S.

466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and then *Ring v. Arizona*, the United States Supreme Court found that any fact that increases the maximum sentence imposed on a defendant must be found by a jury, including the existence of an aggravating factor allowing for the imposition of the death penalty. In *Summerlin*, the Supreme Court held that *Ring* did not apply retroactively. However, *Ring* did not address the right to have a jury find and weigh the existence of aggravating and mitigating factors by proof beyond a reasonable doubt.

The right to have this weighing decision found by proof beyond a reasonable doubt by the jury - not an appellate court - is at issue in Mr. Fears' case and has not been directly addressed by either *Ring* or *Summerlin*. Therefore, the State's argument that *Hurst* is not retroactive because *Ring* is not retroactive is misplaced. In fact, additional Supreme Court precedent indicates *Hurst* may indeed be retroactive as "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive." See *Guardado v. Jones*, N.D.Fla. No. 4:15CV256-RH, 2016 WL 3039840, at *2 (May 27, 2016) (citing *Ivan V. v. City of New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972)).

III. *Belton* is distinguishable from the facts presented in Mr. Fears' case.

The State argues that this Court's decision in *Belton*, 2016-Ohio-1581, unequivocally held that *Hurst* does not apply to Ohio death penalty cases. (Mem. in Opp'n at 2.) However, this reading of *Belton* is much too broad. Furthermore,

as outlined below, *Belton* is easily distinguishable from the factual underpinnings of Mr. Fears' case.

The issue before the *Belton* Court was whether a defendant **who waives his right to a jury trial and pleads guilty to aggravated murder and the accompanying death specifications**, is nonetheless entitled to a jury determination regarding (1) the existence of any mitigating factors and (2) whether the aggravating circumstances pled to by the defendant outweigh said mitigating factors. 2016-Ohio-1581, at ¶ 55. In response, the *Belton* Court held that “when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilty, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.” *Id.* at ¶ 61. *Belton*'s all-or-nothing holding that a defendant who waives his jury trial right also waives his right to be sentenced by a jury has no bearing on the sentencing rights of a defendant who, as Mr. Fears has done, invokes his Sixth Amendment right to be tried by a jury.

In reaching its holding, the *Belton* Court distinguished Ohio's death penalty scheme from those at issue in *Ring* and *Hurst*.

Ohio's capital-sentencing scheme is unlike the laws at 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).

Id. at ¶ 59. While explaining and distinguishing Ohio’s death penalty scheme, the *Belton* Court merely illustrated the Ohio statute’s compliance with the constitutional protections enforced in *Ring* and *Hurst*. Specifically, if Belton so desired, he could have demanded a jury trial pursuant to his Sixth Amendment right, conceded guilt at the trial phase, and then under Ohio’s capital sentencing scheme received a sentencing determination by a jury not subject to judicial upward departure, which complies with the requirements of *Hurst* and *Ring*. *See id.* Thus, the *Belton* Court held that, when Belton waived his jury trial right, he with it waived the jury sentencing protections guaranteed by the Sixth Amendment per *Ring* and *Hurst*, and afforded by the Ohio statute and Ohio capital sentencing scheme. *Id.* at ¶ 61.

After presenting the aforementioned reasoning for its holding, the *Belton* Court further stated “[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because ‘these determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.’” *Id.* at ¶ 60. This statement by the *Belton* Court was not central to its holding and is therefore dicta of no precedential value. Further supporting that the statement is dicta, the *Belton* court cited non-binding case law from several different states in support of the proposition, but did not address or overrule binding Ohio Supreme Court precedent that the weighing of aggravating

and mitigating circumstances is a finding of fact in Ohio. *See State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 69 (citing R.C. § 2929.03(B) and (D)). Nor could it as such a ruling would directly conflict with *Hurst's* holding that the weighing process is as much the province of the jury as is the finding of aggravating factors. *See* 136 S.Ct. at 622, 624.

IV. A Stay of Execution is appropriate in order for the Court to fully consider the constitutional violations alleged in the Motion.

The State argues that a stay of execution is not appropriate because there is “more than enough time” to address the legal issues prior to Mr. Fears’ execution. (Mem. in Opp’n at 4.) Mr. Fears is entitled to a stay of execution for the Court to have an opportunity to fully adjudicate the merits of his claims prior to his execution. Despite the State’s claim that the constitutional violations raised in Mr. Fears’ motion will be quickly resolved, Mr. Fears’ counsel is obligated to promptly raise these new constitutional violations warranting relief. Rather than wait to file last minute litigation, counsel’s duty and due diligence requires raising these new constitutional claims for the Court’s consideration in a timely manner.

CONCLUSION

For the reasons fully stated in the Motion for Stay of Execution, Mr. Fears respectfully requests 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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