

In the Supreme Court of the United States

Kelly Foust,
Petitioner,
v.

State of Ohio
and
The Honorable Judge Cassandra Collier-Williams
Respondents,

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
KATHERINE E. MULLIN*
Assistant Prosecuting Attorney
**Counsel of Record*
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216-698-6454
kemullin@prosecutor.cuyahogacounty.us
Counsel for Respondent State of Ohio

MARK STANTON
Cuyahoga County Public Defender

JEFFREY M. GAMSO
Assistant Public Defender
310 Lakeside Ave., Suite 200
Cleveland, Ohio 44113
216-443-7583
Counsel for Petitioner Kelly

QUESTIONS PRESENTED

Does Ohio's death penalty scheme in which a jury's death verdict is a mere recommendation and in which a death sentence may not be imposed unless a judge makes additional factual findings violate the Sixth Amendment right to a jury as explained in *Hurst v. Florida*?

If Ohio's death penalty scheme does violate the Sixth Amendment right to a jury as set forth in *Hurst v. Florida*, can a capital defendant's jury waiver that predates *Hurst* be understood as a knowing, intelligent, and voluntary waiver of his penalty-phase Sixth Amendment right as identified in *Hurst*?

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INTRODUCTION

Kelly Foust, intervenor below, has filed a petition for certiorari arguing that Ohio's capital sentencing scheme is unconstitutional under *Hurst v. Florida*, 577 U.S. __, 136 S.Ct. 616 (2016), and that *Hurst* should be applied to invalidate the jury waiver he entered in 2001. The Court should deny certiorari for at least two reasons. *First*, *Hurst* has no application to Ohio's capital sentencing scheme. *Second*, this case is a poor vehicle to decide Foust's questions.

On March 31, 2001, Kelly Foust bludgeoned Jose Coreano to death with a hammer and raped and tortured Jose's daughter, Damaris. *Foust v. Houk*, 655 F.3d 524, 527-528 (2011). Before leaving the Coreano home, Foust tied Damaris to the leg of a bathtub and lit the home on fire. *Id.* She barely escaped with her life.

Foust was capitally indicted and was appointed two attorneys. Later that year, he waived his right to a jury trial and was convicted and sentenced to death by a three-judge panel. *Id.* Foust's convictions and death sentence were affirmed until 2011 when the Sixth Circuit Court of Appeals granted a conditional writ of habeas corpus and ordered a new mitigation hearing. *Id.*

In advance of the new mitigation hearing, Foust argued that he was entitled to withdraw his prior jury waiver under *Hurst*. The trial court "invalidated" Foust's jury waiver "and/or" allowed him to withdraw his waiver. *State ex. rel. O'Malley v. Collier-Williams*, 153 Ohio St.3d 553, 108 N.E.2d 1082, ¶20 (Pet. App. A). Cuyahoga County Prosecutor Michael C. O'Malley brought an original action against Judge Cassandra Collier-Williams in the Ohio Supreme Court. The Ohio Supreme Court

granted a writ of prohibition and ordered Judge Collier-Williams to vacate her order. *Id.* at ¶1 (Pet. App. A).

For nearly twenty years the Court has held that “any fact that ‘expose[s] a defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” *Hurst* at 621 (*citing Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The Court applied *Apprendi* to Arizona’s capital sentencing scheme, declaring it unconstitutional because it “allowed a judge to find the facts necessary to sentence a defendant to death.” *Id.* (*citing Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). In *Hurst*, the Court applied *Ring* to Florida’s capital sentencing scheme, finding it unconstitutional for much of the same reasons.

In 2018, the Ohio Supreme Court, addressing *Hurst*, held that Ohio’s capital scheme did not violate the Sixth Amendment. *State v. Mason*, 153 Ohio St.3d 476, 108 N.E.3d 58, 2018-Ohio-1462 (2018), *cert. denied*, 139 S.Ct. 456 (2018). Foust, seeking certiorari from a state writ against a trial court judge, asks the Court again to consider the question already declined in *Mason*.

But *Hurst* does not impact Ohio’s capital sentencing scheme. In Ohio, a capital “jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and-unlike the juries in *Ring* and *Hurst*-the aggravating circumstance specifications for which the offender was indicted.” *Mason*, 2018-Ohio-1462, ¶20. It is the jury that makes all necessary factual findings. Absent that unanimous finding by the jury, an Ohio trial court judge has no ability to impose a

death sentence.

Foust affirmatively waived his right to have a jury consider any part of his trial. As the Ohio Supreme Court stated, “when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.” *State v. Belton*, 149 Ohio St.3d 165, 74 N.E.3d 319, 2016-Ohio-1581, ¶61. *Hurst* has no impact on Foust’s 2001 strategic decision to waive his right to a jury.

Foust presents the Court with two questions, one which the Court has repeatedly declined to review, and another that is not supported by the Court’s precedent. Even if the questions presented warranted review, the procedural history of the instant case does not provide a good avenue to answer them. Foust himself previously recognized this when he told the Ohio Supreme Court that this case “is not the proper vehicle for a full determination of whether and how *Hurst* shows that Ohio’s death penalty law violates the Sixth Amendment [...].” Intervenor’s Merit Brief, pg. 20, Ohio Supreme Court No. 2017-0346 (Sep. 14, 2017) ,http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=831738.pdf.

The Court should deny certiorari.

COUNTERSTATEMENT

Petitioner Kelly Foust snuck into the Cleveland home of 54-year-old Jose Coreano and killed him by beating his head with a hammer. *State v. Foust*, 105 Ohio St.3d 137, 823 N.E.2d 836, 2004-Ohio-7006. Foust then went upstairs where he repeatedly raped and tortured Jose’s 17-year-old daughter, Damaris Coreano. *Id.* Before leaving the house with stolen items, Foust tied Damaris to a bathtub and set

the house on fire. *Id.*

In 2001, Foust was indicted with aggravated murder, attempted murder, rape, aggravated arson, and a host of other offenses. Prior to trial, Foust signed and filed a jury waiver, electing to try his case to a panel of three judges. *Id.* at ¶38. He was convicted and sentenced to death.

Foust appealed and, among other things, challenged the validity of his jury waiver. The Ohio Supreme Court held that Foust knowingly, intelligently, and voluntarily entered his waiver. The court specifically found that “the record reflects that all were aware—including Foust—that his waiver of a jury trial meant that the three-judge panel would impose sentence during the penalty phase.” *Id.* at ¶54. The court affirmed Foust’s convictions and sentence.

Foust pursued postconviction actions and filed a habeas corpus petition in the Northern District of Ohio. The district court denied the petition. A divided Sixth Circuit reversed, finding that Foust’s trial counsel was ineffective during mitigation. *Foust v. Houk*, 655 F.3d 524 (2011). A conditional writ was issued ordering Ohio to conduct a new mitigation hearing.

Once back in state court, Foust argued that he was entitled to a jury for his new mitigation phase. The trial court initially disagreed, applying the clear language of Ohio Revised Code §2929.06. Relevant here, that statute directs that if a sentence of death is vacated by a state or federal court because of an error that occurred in the sentencing phase of the trial, and if the offender was previously tried by a panel of three judges, that panel or a new panel if necessary will conduct the

hearing. Ohio Revised Code §2929.06(B).

On March 7, 2017, Foust again moved for a jury during the new mitigation hearing. Foust claimed that he was entitled to a jury because of the Court's decision in *Hurst*. Over the state's objection, the trial court granted Foust's motion.

Cuyahoga County Prosecutor Michael C. O'Malley filed a complaint for a writ of prohibition and a writ of mandamus against the trial court judge in the Ohio Supreme Court. *State ex rel. O'Malley v. Collier-Williams*, 153 Ohio St.3d 553, 108 N.E.2d 1082, 2018-Ohio-3154 (Pet. App. A). Foust was granted leave to intervene as respondent. The court granted the writ of prohibition, holding that the trial court "patently and unambiguously lacked jurisdiction to invalidate Foust's prior jury waiver and empanel a jury for his resentencing hearing." *Id.* at ¶25. (Pet. App. A). It is from that decision that Foust asks the Court to grant certiorari.

REASONS FOR DENYING THE WRIT

I. Ohio's Capital Sentencing Scheme Is Significantly Different Than The Capital Sentencing Schemes At Issue In *Ring* And *Hurst*.

In his first question, Foust asks whether Ohio's capital sentencing scheme violates the *Apprendi* rule. The answer to that question is no.

Absent waiver, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490. See *Blakely v. Washington*, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("[b]ut nothing prevents a defendant from waving his *Apprendi* rights."). Foust unequivocally waived that right in 2001. *State v. Foust*, 2004-Ohio-7006.

Even if Foust had not waived his rights, the Court's precedent does not support his position. Under the *Apprendi* rule, the Court found Arizona's capital sentencing scheme unconstitutional because the trial court alone "determine[d] the presence or absence of the aggravating factors required...for the imposition of the death penalty." *Ring* at 588. Using the same analysis, the Court found Florida's capital sentencing scheme unconstitutional because Florida, like Arizona, "does not require the jury to make the critical findings necessary to impose the death penalty." *Hurst* at 622. Ohio's capital sentencing scheme requires a jury make all necessary findings.

A. Ohio Juries Make All Necessary Factual Findings Before A Sentence of Death May Be Imposed.

Under Ohio's capital sentencing scheme, a jury (unless waived) must unanimously find a defendant guilty of aggravated murder and at least one of the specifically enumerated specifications. Ohio Revised Code §2929.03 and §2929.04. Only after that finding would a trial continue to a second phase where a penalty is considered.

In the second phase (known as the "sentencing phase"), "the court and trial jury shall consider (1) any presentence-investigation or mental-examination report ***, (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel." *State v. Mason*, 2018-Ohio-1462, ¶10

(citing R.C. 2929.03(D)(1)). In this phase, the state must prove beyond a reasonable doubt that “the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.” *Id.*

It is the jury that recommends a sentence. Only if the “trial jury unanimously finds, by proof beyond a reasonable doubt that the aggravating circumstances *** outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.” *Id.* at ¶11 (citing R.C. 2929.03(D)(2)). Absent such a finding, “the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court ‘shall impose the [life] sentence recommended.’” *Id.*

An Ohio trial judge cannot impose a death sentence absent the above conditions. *Chinn v. Jenkins*, 2017 U.S. Dist. LEXIS 22088 at *5 (S.D. Ohio, 2017). However, the trial judge may reject a jury’s recommendation of a death sentence and impose a life sentence.

B. The Sixth Amendment Does Not Require That The Jury Weigh The Aggravating Circumstances Against The Mitigating Factors.

Recognizing the difference in Ohio’s scheme, Foust argues that *Hurst* requires a jury to weigh the aggravating circumstances against the mitigating factors. He is incorrect.

First, Foust waived an *Apprendi* challenge when he waived his right to a jury. *Second*, *Hurst* focused only on if the jury made a factual finding of the existence of an aggravating circumstance. *Hurst* at 622. *Third*, the weighing that occurs in the

sentence phase is not a fact-finding process. *State v. Mason*, 2018-Ohio-1462, ¶36. *Fourth*, even if the Court were to find that a jury must conduct the weighing process, Ohio's capital sentencing scheme would satisfy that requirement. *Id.* at ¶30. Because Ohio's capital sentencing scheme would survive even Foust's expanded interpretation of *Hurst*, the instant case does not provide a good framework to decide the questions presented.

C. The Ohio Supreme Court Has Rejected Application Of *Hurst* Five Times And This Court Has Repeatedly Declined Certiorari.

Due to the critical differences in Ohio's capital sentencing scheme, the Ohio Supreme Court has repeatedly upheld Ohio law despite challenges brought under *Ring* and *Hurst*. See *State v. Belton*, 149 Ohio St.3d 165, 74 N.E.3d 316, 2016-Ohio-1581, *cert. denied*, 137 S.Ct. 2296 (2017); *State v. Mason*, 2018-Ohio-1462, *cert. denied*, 139 S.Ct. 456 (2018); *State v. Wilks*, 154 Ohio St.3d 359, 114 N.E.2d 1092, 2018-Ohio-1562, *cert. denied*, 139 S.Ct. 645 (2018); *State v. Goff*, 154 Ohio St.3d 218, 113 N.E.3d 490, 2018-Ohio-3763; *State v. Tench*, _Ohio St.3d_, 2018-Ohio-5205. The Court has yet to grant certiorari over this question and it should decline to do so here.

II. This Case Does Not Provide A Good Avenue to Address The Questions Foust Presented.

For at least four reasons, the instant case does not provide the Court with a good vehicle to address Foust's questions.

First, Foust waived his *Apprendi* rights when he waived his right to a jury in 2001. Foust argues that *Hurst* "expanded the scope of [his] Sixth Amendment right," Petition, pg. 3, and that he could not have waived a right that did not exist in 2001.

To the contrary, *Hurst* applied *Apprendi*, which existed at the time of Foust's jury waiver and trial. The Court *did not*, as Foust suggests, hold that a capital defendant has a Sixth Amendment right to be sentenced by a jury. *Hurst*, 577 U.S. __, 136 S.Ct., 616, 624 (Breyer, J., concurring). And Foust's attempts to backdoor an ineffective assistance challenge to his jury waiver should not be considered as it was not properly raised in the courts below.

Second, Foust's own arguments show why certiorari should be denied. Foust states that certiorari should be granted because of "the specific context of this case [...]." Petition at 12. The Court generally does not grant certiorari for case-specific questions. Foust's statement in his Petition is consistent with his position in the Ohio Supreme Court below, where he argued that the instant case "is not the proper vehicle for a full determination of whether and how *Hurst* shows that Ohio's death penalty law violates the Sixth Amendment [...]." Intervenor's Merit Brief, pg. 20, Ohio Supreme Court No. 2017-0346 (Sep. 14, 2017), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=831738.pdf. Foust asks the Court to grant certiorari over a question he asked the Ohio Supreme Court to specifically avoid.

Third, Foust seeks certiorari from a decision in a state writ issued while criminal proceedings are pending. While the Ohio Supreme Court's decision may be final under 28 U.S.C. §1257, there are other cases better suited to decide the application of *Hurst* to Ohio's capital sentencing scheme.

Fourth, there is no conflict to resolve. Foust relies on Delaware's application

of *Hurst* to overcome his shortcomings. In *Rauf v. State*, 145 A.3d 430 (Del. 2016), the Delaware Supreme Court found Delaware's capital sentencing scheme unconstitutional. However, Delaware's capital scheme was significantly different than Ohio's. For example, a Delaware trial judge could make independent factual findings and could disregard a jury's recommendation of a life sentence. *Id.* at 433-434. Delaware's "contestable", *Id.* at 436, reading of *Hurst* does not support a writ of certiorari.

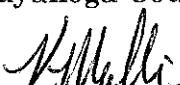
For all these reasons, the instant case does not provide a good vehicle to decide the questions Foust presented. The Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor



KATHERINE E. MULLIN*

Assistant Prosecuting Attorney
**Counsel of Record*
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216-698-6454
kemullin@prosecutor.cuyahogacounty.us
Counsel for Respondent State of Ohio