No.

IN THE

SUPREME COURT OF THE UNITED STATES

KELLY FOUST

Petitioner,

v.

STATE OF OHIO

Respondent.

PETITON FOR WRIT OF CERTIORARI

Kelly Foust respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio refusing to apply this Court's holding in *Hurst v. Florida* to Mr. Foust's capital case.

COUNSEL FOR RESPONDENT

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
Counsel for Respondent State of Ohio

COUNSEL FOR PETITIONER

JEFFREY M. GAMSO
Counsel of Record
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
Counsel for Petitioner Kelly Foust

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*?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

United States Constitution

STATUTES

OPINIONS BELOW

The Ohio Supreme Court's decision in *State ex rel. O'Malley v. Collier-Williams* [Kelly Foust intervening respondent], 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082 (2018) was entered August 9, 2018 (Appx. 1). The court denied Mr. Foust's motion for reconsideration on October 10, 2018. *Case Announcements*, ___ Ohio St.3d ___, 2018-Ohio-4091, 108 N.E.3d 1103 (2018) (Appx. 6).

JURISDICTION

Petitioner seeks review from the August 9, 2018 decision of the Supreme Court of Ohio in in *State ex rel. O'Malley v. Collier-Williams* [Kelly Foust intervening respondent], 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082 (2018) (Appx. 1). The court denied Mr. Foust's motion for reconsideration on October 10, 2018. *Case Announcements*, ___ Ohio St.3d ___, 2018-Ohio-4091, 108 N.E.3d 1103 (2018) (Appx. 6).

On January 8, 2019, Justice Sotomayor extended the time within which to file a petition for writ of certiorari to and including March 11, 2019.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In April 2001, a Cuyahoga County, Ohio grand jury charged Petitioner Kelly Foust with, as relevant here, aggravated murder and accompanying capital specifications. In December 2001, and as provided by Ohio statutes, Mr. Foust waived his right to a jury trial and elected to proceed before a three-judge panel comprised of Judges Stuart A. Friedman, Eileen A. Gallagher, and Robert T. Glickman. The panel found Foust guilty and in January 2002 sentenced him to death.

Mr. Foust's conviction and death sentence were affirmed on direct appeal by the Ohio Supreme Court. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 845 (Ohio 2004), reconsideration denied, 105 Ohio St.3d 1454, 2005-Ohio-763, 823 N.E.2d 458 (2005). That court refused to hear Foust's appeal from the denial of his state post-conviction petition. *State v. Foust*, 108 Ohio St.3d 1509,

2006-Ohio-1329, 844 N.E.2d 855 (Ohio 2006), cert denied, *Foust v. Ohio*, 549 U.S. 874 (2006).

In 2011, the Sixth Circuit issued a conditional writ of habeas corpus granting Mr. Foust penalty-phase relief pending a new penalty-phase trial. *Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011). Two days after this Court denied a motion by the Cuyahoga County prosecutor to intervene and file a petition for writ of certiorari, *Ohio v. Foust*, 565 U.S 1233 (2012), the State filed a motion for a new penalty-phase trial.

In August 2012, the State filed a motion to have Mr. Foust's 2001 jury waiver apply to the new penalty-phase trial and Foust filed a motion to have a jury hear the new penalty phase. Because of a recusal, a retirement, and an elevation to an appellate court, the panel scheduled to try the new penalty phase includes none of the judges for whom Foust had originally waived a jury. Nevertheless, the State's motion was granted.

In March 2017, Mr. Foust renewed his motion for a penalty-phase jury in light of this Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616, (2016). Foust argued that while his 2001 jury waiver may have been sufficient to satisfy Ohio's procedural rules and the Sixth Amendment jury right as understood in 2001, *Hurst* expanded the scope of that Sixth Amendment right. It now specifically included the right to have "a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id* at 136 S.Ct. 619. Because that right did not exist in 2001, Foust did not knowingly, intelligently, and voluntarily waive that right and could

not have done so. The judge now presiding over Foust's case, the Honorable Cassandra Collier-Williams, agreed and granted the motion.

The State promptly filed with the Chief Justice of the Ohio Supreme Court to have Judge Collier-Williams disqualified from hearing Mr. Foust's case[1] and separately filed a petition for writ of mandamus or of prohibition asking the Ohio Supreme Court to vacate the judge's order for a jury and to order the new penalty phase to be heard by a panel of three judges. As the real party in interest, Foust sought and received permission to intervene in the writ action.

In *State ex rel. O'Malley v. Collier-Williams*, 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082 (Ohio 2018) (Appx. 1), reconsideration denied, ___ Ohio St.3d ___, 2018-Ohio-4091, 108 N.E.3d 1103 (2018) (Appx. 6), the court granted the writ of prohibition, holding that *Hurst* had no relevant applicability to Ohio law and that, therefore Mr. Foust's 2001 waiver applied to his new penalty phase.

REASONS FOR GRANTING THE WRIT

I. Predicate Facts

In 2001 and pursuant to Ohio law, Kelly Foust waived his right to a jury trial in his capital case and agreed to be tried by a panel of three judges: Stewart A. Friedman, Eileen A. Gallagher, and Robert T. Glickman. The panel found him guilty and, in 2002, sentenced him to death. That sentence was vacated by the Sixth Circuit which issued a conditional writ ordering either that the state conduct a new penalty phase or that Mr. Foust be given a life sentence. *Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011).

[1] The application was denied. *In re Disqualification of Collier-Williams*, 150 Ohio St.3d 1286, 2017-Ohio-5718, 83 N.E.3d 928 (2017).

According to Ohio Rev. Code § 2929.06(B), a person sentenced to die by a panel of judges rather than by a jury and who is ordered a new penalty phase trial is bound by the prior jury waiver. Thus, following the Sixth Circuit's order, Mr. Foust's new penalty phase trial would be held before a three-judge panel, albeit one containing none of the judges for whom he had waived a jury. However, before that new penalty-phase trial could occur, this Court decided *Hurst v. Florida* holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619.

Following *Hurst*, Mr. Foust argued, and the trial court agreed, that his 2001 jury waiver could not have applied to the penalty phase of his trial because whatever right he had to a jury in 2001, he did not have a Sixth Amendment right to a penalty phase jury. The Ohio Supreme Court disagreed. The court recognized that Ohio statutes did not provide for a trial phase before a three-judge panel and a penalty phase before a jury. And because the court held that judicial fact findings in Ohio capital cases do not implicate the Sixth Amendment, it concluded that *Hurst* had no relevance to Ohio law. It followed for the court, that Foust's jury waiver was both constitutionally sufficient and, given Ohio's statutory provision regarding waivers at successor penalty phase trials, binding.

II *Hurst v. Florida* and its reception in state courts

It is now incontrovertible that under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Where a factual finding is a necessary precursor to

an enhanced or increased sentence, such as a death sentence, any distinction between "elements" of the crime and "sentencing factors" is dissolved. *Id.* at 494. *Apprendi*'s unbending rule has, therefore, invalidated schemes involving sentencing enhancements, *Id.* at 490, mandatory sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 226, (2005), and the death penalty, *Ring v. Arizona,* 536 U.S. 584, 589 (2002).

Apprendi applies to *all findings of fact* necessary to the imposition of an increased sentence under state or federal law. While *Ring* applied the rule to capital cases, given the peculiarities of Arizona law, it's holding was less than specific about the scope of that application. Although it recognized that capital defendants were "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," 536 U.S. at 589, it said nothing about what might happen after the jury speaks. *Hurst* resolved that uncertainty about the application of the Sixth Amendment's jury right to capital sentencing to rest with its clear and unequivocal pronouncement: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." 136 S.Ct. at 619 (emphasis added). And vitally, *Hurst* added, "A jury's mere recommendation is not enough." *Id.*

Hurst explained that under Florida's capital sentencing scheme multiple factual findings were necessary to establish a defendant's death-eligibility. Among those findings, and as relevant here, was the determination of the relative weight of aggravating and mitigating circumstances:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient

> mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Id. (emphases *sic*).

Therefore, under the former Florida statute, *both* the existence of sufficient aggravators to justify a death sentence *and* the relative weight of aggravating factors and mitigating circumstances were factual findings that ought to have been encompassed by the Sixth Amendment's jury rule. The Florida Supreme Court recognized as much on remand in *Hurst.* This Court's holding in *Hurst*, the Florida court said, requires more than "that the jury unanimously find the existence of one aggravating factor and nothing more." *Hurst v. State*. 202 So.2d 40, 53 n.7 (2016). The court elaborated:

> *Hurst v. Florida* made clear that the jury must find 'each fact necessary to impose a sentence of death,' 136 S.Ct. at 619, 'any fact that expose[s] the defendant to a greater punishment,' *id.* at 621, 'the facts necessary to sentence a defendant to death,' *id.*, 'the facts behind' the punishment, *id.*, and 'the *critical findings* necessary to impose the death penalty,' *id.* at 622 (emphasis added).

Id.

Like the Florida court, the Delaware Supreme Court found its state's death penalty statute, which assigned the judge the task of weighing aggravating and mitigating circumstances, unconstitutional. *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016). In *Rauf*, the court overruled its prior decision, issued following *Ring v. Arizona*, that the same statutory scheme was constitutional. *Id.* at 486 (Holland, J., concurring)(noting overruling of *Brice v. State*, 815 A.2d 314 (Del. 2003)).

Delaware's now-defunct capital punishment statute assigned a fact-finding role in capital sentencing to a judge, rather than a jury. 11 Del.C. § 4209. Upon a conviction of first-degree murder, the jury unanimously determined, beyond a reasonable doubt, the

presence of an aggravating circumstance. *Id.* Once it did so, however, the court alone made additional factual findings authorizing a death sentence. *Id.* The statute provided that "the Court … shall impose a sentence of death if the Court finds by a preponderance of the evidence, … that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist." *Id.*

The *Rauf* court found that provision, because it assigned this determination to a judge, rather than a jury, violated the Sixth Amendment. *Rauf*, 145 So.3d at 433-34. Specifically, with respect to the relative weight of aggravating and mitigating circumstances, the court observed:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

Id. at 485 (Holland, J., concurring).

Like the capital sentencing schemes in Florida and Delaware, Ohio's capital statutes provide that before a defendant can be sentenced to death, the judge must determine that the aggravating circumstance specifically found by the jury outweighs the mitigating factors.

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on

> the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the [life] sentences on the offender.

Ohio Rev. Code § 2929.03(D)(3).

But unlike the Florida and Delaware Supreme Courts, the Ohio Supreme Court has held that the weighing of aggravating circumstances against mitigating factors[2] is not a factual finding - at least, not one on which the Sixth Amendment has any bearing.

> After the *Hurst* decision, we revisited the issue in *State v. Belton*, 149 Ohio St. 3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59, stating that "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." In reaching that conclusion, we reasoned that Ohio law requires a jury in a capital case to make the findings required by the Sixth Amendment, because "the determination of guilt of an aggravating circumstance renders [an Ohio] defendant eligible for a capital sentence," *Belton* at ¶ 59, and the weighing of aggravating circumstances against mitigating factors "is *not* a fact-finding process subject to the Sixth Amendment" (emphasis sic), *id.* at ¶ 60.

State v. Mason, 153 Ohio St.3d 476, 481, 2018-Ohio-1462, ¶ 18, 108 N.E.3d 56, 62 (2018).

Thus, Ohio asserts that the judge's finding that the aggravating circumstance outweighs the mitigating factors is not a Sixth Amendment finding (although the jury's finding of relative weights apparently is).

III Kelly Foust's jury waiver and the effect of *Hurst*

Foust's initial waiver of jury sentencing cannot constitutionally bind him in his new, *de novo*, resentencing proceeding. As the Sixth Circuit observed, "a defendant's jury waiver entered prior to the first trial of his case does not bar his right to a jury trial on the same case after remand from a reviewing court." *Davis v. Coyle*, 475 F.3d 761, 780 (6th Cir. 2007). Now that it is apparent that a defendant's Sixth Amendment jury trial rights extend to the penalty phase of a capital trial, the phase at which a jury in a weighing state

such as Ohio must determine whether aggravating circumstances outweigh mitigating factors, these principles apply with equal force to a *de novo* resentencing hearing, like that ordered in Foust's case.

Moreover, a defendant's decision that it is in his best interests to plead guilty or waive his right to jury fact finding in sentencing is a direct result of his (and his counsel's) assessment of the issues in the case, the facts that are in dispute, and, in a death penalty case, which would be more likely to spare his life. When counsel fail egregiously in their duty to uncover exculpatory or mitigating evidence, their incompetent preparation, and their expected presentation, will necessarily influence the client's assessment of the potential cost and benefit of foregoing the exercise of his constitutional rights.

This apparent truth is not only obvious to anyone familiar with the criminal justice system, it is also the basic understanding of a substantial line of jurisprudence surrounding the impact of ineffective assistance of counsel on guilty pleas.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court discussed the impact of ineffective counsel on a defendant's decision to plead guilty, recognizing that a defendant's waiver of his jury trial rights is necessarily tethered to the advice he received from his counsel. The Court explained that the analysis of prejudice in the context of a jury trial waiver is essentially the same as after a litigated proceeding:

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part

---

[2] And, implicitly, the determination of whether any mitigating factors exist and if so which ones.

> on a prediction whether the evidence likely would have changed the outcome of a trial.

Id. at 59.

Where, as here, an appellate court has already determined that counsel's failure to uncover mitigating evidence may have altered the outcome of the proceeding, *Foust v. Houk*, *supra*, it is apparent that those same omissions would have impacted the defendant's decision to waive a jury. *See id.* At his original trial, Foust's counsel "presented no evidence during the guilt phase," *State v. Foust*, 105 Ohio St.3d 137, 140, 2004-Ohio-7006, ¶ 23, 823 N.E.2d 836, 847 (2004), and "offered no significant mitigating evidence" during the penalty phase. *Id.* at 170, 2004-Ohio-7006 at¶ 202, 823 N.E.2d at 871. Even the scant mitigation evidence that was presented would have been entirely unknown to Foust at the time of his jury waiver because his attorneys failed to interview any of the witnesses who were called at the penalty phase prior to their testimony. *Foust v. Houk*, *supra* at 537. Under these circumstances, it is no surprise that in 2001 Foust concluded that waiving his jury rights may have been in his best interests.

Now, however, the circumstances have changed. Foust's background contained a wealth of mitigating information relevant to the appropriate sentence in this case. *Foust v. Houk*. As the Sixth Circuit concluded, had this evidence been presented, Foust may not have received a death sentence. *Id.* at 546. It is also apparent that this new evidence altered Foust's earlier decision to waive a jury. The standard for "prejudice" explicated in *Hill v. Lockhart*, therefore, has been satisfied. *See Hill*, 472 U.S. at 59.

Because Foust's decision to waive his jury rights cannot be disentangled from counsel's ineffective investigation and assistance, it undermines his constitutional rights to continue to bind him with his prior jury waiver.

Yet, and even if that were not so, *Hurst* undermines that right.

In the specific context of this case, it was the statutory penalty-phase right to that "mere recommendation" Kelly Foust waived when he agreed to have his case decided by Judges Friedman, Gallagher, and Glickman. He did not waive, and could not have waived, the Sixth Amendment right to have all facts necessary to impose a death sentence determined by a jury and for the jury's verdict to be more than a "mere recommendation" because until *Hurst* was decided, there was no such right to waive. It follows that Foust's 2001 waiver of his right to a jury at the penalty phase of his case can no longer be binding and he must be allowed a jury for his resentencing.

CONCLUSION

Ohio's capital sentencing scheme providing that a jury's verdict for death is a "mere recommendation" and that a death sentence cannot be imposed absent a judicial finding of facts violates the Sixth Amendment right to a jury as identified in *Hurst v. Florida.*

Kelly Foust's 2001 waiver of his right to a jury for his capital case did not include a waiver of that Sixth Amendment right because it had not been recognized at that time.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY M. GAMSO
Assistant Public Defender
Courthouse Square, Suite 200
310 Lakeside Avenue
Cleveland, Ohio 44113
216-443-7583

Counsel for Petitioner, Kelly Foust