Capital Case

Case No. _____

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE QUISI BRYAN, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS
CAPITAL CASE

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

ALAN C. ROSSMAN (0019893)
Assistant Federal Public Defender
BEVLYNN J. SLEDGE
Research and Writing Specialist
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856; (216) 522-1951 (facsimile)
alan_rossman@fd.org
bevlynn_joann_sledge@fd.org

Counsel for Petitioner Quisi Bryan

QUESTIONS PRESENTED FOR REVIEW

Bryan's habeas petition presents exceptional circumstances that, if left unresolved, will result in disparate interpretations of the federal Constitution across the several states so that the Constitution may mean one thing in Ohio and another thing in other states. If the Sixth Circuit's holding in this case is correct, then federal courts are barred from reviewing and unifying the States' individual interpretations of federal constitutional law in instances where the States voluntarily apply new law retroactively without direction from this court to do so. If the Sixth Circuit's holding in this case is correct, Bryan may be put to death without any federal court ever reviewing whether the State of Ohio unlawfully infringed upon his federal constitutional rights.

The questions presented are:

I. Whether the Ohio Supreme Court's merits denial of Bryan's *Hurst* claim was erroneous insofar as appellate reweighing cannot cure the errors that affected the jury deliberations in Bryan's case?

II. Whether 28 U.S.C. § 2244 prevents a federal habeas court from reviewing a state court's voluntary and independent retroactive application of a new rule of federal constitutional law in order to ensure the uniform interpretation of federal constitutional law across all states?

III. Whether Bryan's *Hurst* claim became newly-ripened within the meaning of *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), thereby permitting federal habeas review of the claim in a second-in-time first habeas petition, when the state of Ohio retroactively applied a new rule of constitutional law to Bryan's case giving him his first opportunity to litigate and exhaust the claim in state court?

LIST OF PARTIES

The parties are the same as those listed in the caption.

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JURISDICTIONAL STATEMENT

Petitioner Quisi Bryan timely filed a Petition for a Writ of Habeas Corpus in the United States District Court, Northern District of Ohio, on March 14, 2018. On June 12, 2018, the district court transferred Bryan's habeas petition to the Sixth Circuit Court of Appeals for permission to file a second or successive petition pursuant to 28 U.S.C. § 2244. Thereafter, Bryan moved to remand the petition to the district court for merits review as a second-in-time first habeas petition.

On February 19, 2019, the Sixth Circuit Court of Appeals denied Bryan's motion to remand and denied Bryan permission to file a second or successive habeas corpus petition with the suggestion he pursue relief through an original writ to this Court.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the U.S. Constitution.

STATEMENT OF REASON FOR NOT FILING IN DISTRICT COURT

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Bryan states that he has not applied to the district court because the circuit court prohibited such an application. Bryan exhausted his State remedies for his *Hurst* claim and received a denial on the merits. Since Bryan exhausted his State remedies and was denied permission by the court of appeals to file a second habeas petition, he cannot obtain relief in any other form or any other court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution states, in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment of the United States Constitution states, in relevant part:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment of the United States Constitution states, in relevant part:

"nor [shall] cruel and unusual punishments [be] inflicted."

28 U.S.C. § 2241

28 U.S.C. § 2244

28 U.S.C. § 2254

INTRODUCTION

Time and again this Court has demonstrated commitment to the principle that AEDPA cannot deny a habeas corpus petitioner at least "one full bite" – *i.e.*, at least one meaningful opportunity for post-conviction review in a district court, a court of appeals, and via *certiorari*, the Supreme Court. (Randy Hertz and James S. Leibman, Federal Habeas Corpus Practice and Procedure, Seventh Edition § 3.2 (Matthew Bender)) (applying "one full bite" metaphor in AEDPA context and citing cases.) Against the backdrop of this precedent, the Sixth Circuit Court of Appeals' decision stands opposed by denying Bryan one full and fair pass through federal court review following the Ohio Supreme Court's merits adjudication of his newly-ripened federal constitutional claim. The Sixth Circuit's Order stands particularly egregious given that this is a capital case, and Bryan remains sentenced to death despite the Ohio Supreme Court, federal district court, and Sixth Circuit Court of Appeals all agreeing that Bryan's constitutional rights were violated at trial where prosecutorial misconduct impermissibly influenced the jury's deliberations. According to the Circuit Court, Bryan's last and only opportunity for federal review of a state court decision that his federal constitutional rights were not violated rests with this Court through its original writ jurisdiction because no other federal court is authorized under AEDPA to review the claim.

STATEMENT OF THE CASE

I. Trial Court Proceedings.

I.a. The Culpability Phase.

Bryan, an African American tried in Ohio's perhaps most diverse county – Cuyahoga, was convicted and sentenced to death by a conspicuously all Caucasian jury. He admittedly shot and killed police officer Wayne Leon at close range during a traffic stop. However, the evidence at trial was substantive enough to warrant, as a matter of Ohio law, a lesser-included jury instruction on Manslaughter. State witness, Harold Jackson, described the shooting incident not inconsistent with Bryan's description, and the trial court instructed the jury on the non-capital Manslaughter charge. The Ohio Supreme Court itself noted that upon his arrest Bryan said, "I feel sorry for the officer and things aren't like they seem." *State v. Bryan*, 804 N.E.2d 433, 445 (2004).

The community was tuned in, literally; the officer's funeral was a televised event. The trial judge made it known his brother was also a police officer, and acknowledged having watched the officer's funeral. Officers came en masse from around the state to pay tribute, packing the courtroom. The predominant theme of the state's culpability presentation was summed up in closing argument where the Prosecutor lamented the tragedy and hardship that the homicide caused the decedent officer's family: "It's horrifying to even imagine that there are people out there who commit such senseless, calculating and brutal acts that would rob a family of this young man's life all for the sake of his own personal liberty." (Appendix Transcripts Vol. 6, RE 58 (hereinafter "RE 58"), PageID #8008.)[1] The prosecutor continued:

[1] All references to the trial transcripts are from *Bryan v. Bobby*, United States District Court, N.D. Ohio, Case No. 1:11-CV-0060.

> And there's one other participant in this case that we have forgotten all about and you haven't heard a lot of mention. You haven't heard family members come in here and tell what type of person [Officer Leon] was, what type of harm it's been to his family.
>
> That's because we don't need that kind of emotion in this case, ladies and gentlemen. You need to recognize that this was a killing of a police officer lawfully engaged in his duty.
>
> Sometime along the way, after we are long gone from the courtroom, when this case is just a memory to you, ladies and gentlemen, Officer Leon's small children will go on a journey of their own to find out what kind of father they had.

(*Id*. at PageID #8014.)

> The prosecutor continued:
>
> He gave the ultimate price, the ultimate in virtue, sacrifice. He lingered in death for a long period of time so that all of his organs could be sustained so that he could give even in death.
>
> * * *
>
> In the years that I've been doing this, working in the prosecutor's office, I have been blessed with the opportunity to try homicide cases, a blessing because you get to observe people who are tragic witnesses of very, very tragic events, family members. And you wonder how they possibly go on? How could they possibly get through the day? They've been left with nothing, devastated.
>
> * * *
>
> It's that a community has come together so that the accounting for what has occurred to Wayne Leon will not go unnoticed. So that his children, when they go on the journey to discover who their father was, that they will know that he was a brave man, that he protected the community, that he took his oath to serve and protect the constitution of the United States, that he was a good police officer, that he was a good father, a good husband and an asset to this community.
>
> I want to leave you with something as far as an old poem, an old writing. I always think in the hour of death you should look to the person, the

> victim of the crime, and learn what they have taken, what type of devastating loss this has been.
>
> 'He has lived a beautiful life and left a beautiful field. He has sacrificed the hour to give service for all time. He has entered the company of the great and with them he will be remembered forever.'

(RE 58, PageID #8015-17)

Finally, the prosecutor asked the jury to render a culpability phase verdict in order to send an appropriate message to the children of the deceased officer:

> Let Wayne Leon's children know that when you returned your verdict, ladies and gentlemen, that you made a search for the truth. That you had faith in the law and that, most importantly, you had faith in yourselves that you, in fact, would do the right thing here, and that would be to find justice so that there is recourse to the law, that there is an accounting for the senseless killing and that their father will be remembered as a hero and not just some incidental on the radar screen because Quisi Bryan was having a bad day.

Id. at PageID #8017.

The jury obliged and convicted Bryan of the capital homicide charges.

I.b. The Sentencing / Mitigation Phase.

Like the culpability phase closing argument, the prosecutor's mitigation-phase closing was fraught with improper statements and argument. The prosecutor analogized Bryan to a running time bomb that went off and told the jurors that their weighing of the "killing of a police officer" capital specification included and indeed required them to fulfil their obligation to protect their community: "And when that time-bomb went off, he was a danger not only to officer Wayne Leon, but anyone else in the community, which is why even greater weight should be given to that second specification . . ." (RE 58, PageID #8182.)

The prosecutor argued the entire defense had been an effort to "swindle" the jury with the defense's claim that the homicide was a manslaughter: "He trie[d] to swindle you folks into calling and categorizing this whole thing as a manslaughter." *(Id.* at PageID # 8215.) The theme of "swindling the jury" became a basis to rebut the mitigation being presented: "He will tell you or say to you anything in order to protect himself so that he can survive, as he has survived all these years; so that he can tell the story in prison about killing a cop, beating the rap, swindling the jury into thinking that he had some remorse, ... so that he can tell the folks who are going to a halfway house that killing a policeman ain't no big deal." (*Id.* at PageID # 8216-17.)

Revisiting the earlier assertions that the jury had an obligation to protect their community, the prosecutor explained that society makes killing a police officer an aggravating circumstance "to preserve the public tranquility . . . so that we have an organized society." (*Id.*) The prosecutor confronted the jury directly: "How does society benefit from your decision?" Answering his own question, and carrying his argument to its ultimate conclusion that the jury itself was the guardian of the community, the prosecutor, over objection, advised the jury that unless they sentenced Bryan to death, they would send out the message "that it's okay to shoot a policeman now.":

> But the effect of your verdict, ladies and gentleman, in not returning and finding that the aggravating circumstances outweigh the mitigating factors is that you are telling the ladies and gentlemen of this community, when this is published in the paper, or when you get a chance to read this, about what your verdict is – [. . .] that it's okay to shoot a policeman now.

(*Id.* at PageID # 8220-21.)

Finally, the prosecutor argued that a death verdict would actually deter further police killings and at the same time show policemen they are respected for what they do:

> Is that a deterrent to society, that the next thug, the next gangster-wannabe, thinks he can put a bullet in a policeman and tell a jury, "I'm sorry, I didn't mean it?" That's what the protecting of life is, that your verdict protects the life of the next officer who is confronted with this situation. It stands out that we honor and we respect policemen for what they do.

(RE 58, PageID # 8221.)

The jury obliged, sent the message, and recommended Bryan be sentenced to death. The trial court sentenced Bryan to death and 33 1/2 years.

II. The Direct Appeal to the Ohio Supreme Court.

Bryan unsuccessfully sought relief on direct appeal, *see State v. Bryan*, 804 N.E.2d 433, 443 (2004); *id.* at 471 (affirming convictions and death sentence). On direct appeal, in addition to a *Batson* claim, Bryan raised claims of prosecutorial misconduct. In addition to asserting the prosecutor's comments impacted respectively the outcomes of both the culpability phase and the sentencing / mitigation phases of his trial, Bryan argued that the improper comments from the culpability phase had a prejudicial carryover effect on the sentencing verdict. (*See Strickler v. Greene*, 527 U.S. 263, 305 (1999) (Souter, J., and Kennedy, J., dissenting in part) (discussing carryover effect of culpability phase evidence into penalty phase).

After reviewing the prosecutorial comments detailed above and others, the Ohio Supreme Court found that several of them were "improper." *See, e.g., State v.*

Bryan, 804 N.E.2d at 464. The Ohio Supreme Court found "that the prosecutor committed misconduct when arguing that 'because there's community outrage doesn't necessarily mean that the community is wrong about calling for the ultimate punishment' and that the jury has 'to send out the message * * * that the ultimate penalty should be applied.'" *Id*. at 464-465. The court found several other comments did not constitute plain error but noted that "[s]uch argument improperly suggested the jury could consider the response of public opinion." *Id*.

Additionally, the Ohio Supreme Court found "the prosecutor improperly commented on the testimony of Bryan's mother when arguing, 'Everybody has a mom. I'm sure [decedent Officer] Wayne Leon had a mom. I'm sure that Wayne Leon's children ask their mom, 'Where is daddy?'" *Id*. The Ohio Supreme Court noted that "[s]uch emotionally charged comments did not properly rebut any mitigating evidence or previous defense arguments." *Id*. But, while acknowledging the prosecutorial misconduct, the Ohio Supreme Court ultimately denied relief for the claims by holding, "[m]oreover, **our independent assessment of the sentence has cured any lingering impact from the prosecutor's comments.**" *Id*. (Emphasis added.)

The Ohio Supreme Court summarily dismissed these claims based on its own "consideration" of the death sentence:

> In evaluating this sentence**,** we have considered the potential effect on the jury of the prosecutor's improper remarks during his arguments both in the guilt phase and the penalty phase. **Nonetheless, because the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, we find that the death sentence in this case is appropriate.**

Bryan, 804 N.E.2d at 471 (emphasis added). The court cited to its own longstanding authority, anchored in *Clemons v. Mississippi*, 494 U.S. 738 (1990), holding that the court may directly reweigh aggravators against mitigators as a way to "cure" errors committed by the state during the sentencing / mitigation phase of trial. *Id.*, citing to *State v. Hartman* (2001), 93 Ohio St.3d 274, 295, 754 N.E.2d 1150 (2001).

III. Federal Habeas Litigation.

In 2011, Bryan timely filed his federal habeas corpus petition. After a meticulous review of the record, the district court granted Bryan's petition on his *Batson vs. Kentucky* claim, finding the prosecutor's numerous reasons for striking the sole death-qualified African American juror were all pretextual, and the removal of the juror was intentionally discriminatory. *Bryan v. Bobby*, 114 F.Supp.3d 467 (N.D. Ohio 2015). The Warden timely appealed and Bryan timely filed his notice of cross-appeal. The district court also granted a COA on claims of guilt-phase prosecutorial misconduct and sentencing / mitigation phase prosecutorial misconduct.

III.a. The Sixth Circuit Court of Appeals Decision.

On appeal the Sixth Circuit Court of Appeals, in a split-panel decision, reversed the district court's grant of habeas relief on the *Batson* claim, ruling that "[b]ecause of the deference afforded to state court determinations through AEDPA," the Ohio Supreme Court's rejection of the *Batson* claim was not unreasonable. *Bryan v. Bobby*, 843 F.3d 1099, 1111 (6th Cir. 2016). Circuit Judge, Bernice Bouie Donald, dissented in part, writing that the district court properly found the Ohio Supreme Court decision to be an unreasonable determination of the facts surrounding Bryan's

Batson challenge, "[b]ased on the ample evidence of a race-based motive contained in the record." *Id.* 843 F.3d at 1117.

Specific to the prosecutorial misconduct claims, Bryan argued that the misconduct was pervasive throughout both the guilt phase and the sentencing / mitigation phases of his trial. He asserted that the misconduct from the guilt-phase arguments carried over to the sentencing phase and coupled with the misconduct during the sentencing / mitigation phase his death sentence should be vacated because of the prejudicial impact the misconduct had upon the jury's deliberations. He sought a new sentencing phase hearing.

The misconduct claims were addressed on the merits by the Sixth Circuit Court of Appeals. After noting that any specific acts of prosecutorial misconduct that were not objected to at trial were not defaulted because, as the district court found, the Warden had "forfeited his procedural-default defense," *Bryan*, 842 F.3d at 1114, the federal Circuit court analyzed the merits and took note that:

> [t]he Ohio Supreme Court devoted nine paragraphs to giving an adequate sense of the challenged portion of the prosecutor's closing. *Bryan*, 804 N.E.2d at 459–60, ¶¶ 142–50. Instead of providing a verbatim recount of those nine paragraphs, here are a few examples of the prosecutor's statements:
>
> [W]hen this case is just a memory to you, ladies and gentleman, Officer Leon's small children will go on a journey of their own to find out what kind of a father they had. And ultimately that journey will take them here to this courtroom.
>
> Ultimately, ladies and gentlemen, their mother, their grandfather, their uncles, their friends, their colleagues will all say something about who Wayne Leon was but ultimately it will be your decision * * * that will define Wayne Leon. *Id.* at 459–60, ¶¶ 143–50.

Bryan v. Bobby, 843 F.3d 1099, 1113 (6th Cir. 2016). The Sixth Circuit Court of Appeals, which acknowledged that "[t]he prosecutor's alleged acts of misconduct were many," *Bryan v. Bobby*, 843 F.3d at 1114, went on to deny habeas relief for the following reason:

> **Nonetheless, assuming the comments at the worst, any harm was cured when the Ohio Supreme Court independently reweighed aggravation and mitigation.** *Bryan*, 804 N.E.2d at 469–71, ¶¶ 215–27; *see also id.* at 464, ¶ 182 ("[O]ur independent assessment of the sentence has cured any lingering impact from the prosecutor's comments"). *See LaMar v. Houk*, 798 F.3d 405, 431 (6th Cir. 2015) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006)), *cert. denied*, —— U.S. ——, 136 S.Ct. 1715, 194 L.Ed.2d 814 (2016); *see also Clemons v. Mississippi*, 494 U.S. 738, 749–50, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

Id. (Emphasis added.)

As to the carry-over effect of the misconduct committed during the guilt-phase arguments, the Circuit court held, "Bryan also argues the prosecutor's misconduct in the guilt phase had a carryover effect on the penalty phase[,] [e]ven if true, **that too was cured by appellate reweighing**." *Id.,* 843 F.3d at 114 (emphasis added), citing *Bryan*, 804 N.E.2d at 471, ¶ 227 ("In evaluating this sentence, we have considered the potential effect on the jury of the prosecutor's improper remarks during his arguments both in the guilt phase and the penalty phase.").

III.b. The Denial On The Merits Was Based Upon The Circuit's Own Interpretation Of *Clemons V. Mississippi* To Cure Penalty Phase Weighing Errors.

In denying the misconduct claims, the Sixth Circuit Court of Appeals cited its own precedent that, under the logic of *Clemons v. Mississippi*, 494 U.S. 738, 749–50, (1990), appellate reweighing could and would cure not just penalty-phase jury-

weighing errors, but also prosecutorial misconduct affecting that jury weighing. *Bryan v. Bobby*, 843 F.3d at 1114. The court's reasoning was anchored in its own precedent, citing to *Lundgren v. Mitchell*, 440 F.3d 754, 781–83 (6th Cir. 2006). However, *see also, id.* ("This Court has not addressed a case ... in which the reweighing is said to cure a trial level violation tending to prejudice the jury's view of the evidence, as opposed to the jury's inclusion of an impermissible factor or failure to consider a relevant mitigating factor.").

IV. The United States Supreme Court Decides *Hurst v. Florida*, The Ohio Supreme Court Applies *Hurst* Retroactively, And Bryan's Subsequent Filing In The Ohio Supreme Court.

On January 12, 2016, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). On May 4, 2016, the Ohio Supreme Court, as an unique act of state sovereignty, retroactively applied *Hurst* and granted penalty phase relief to a similarly situated death-row inmate in *State v. Kirkland*, 149 N.E.3d 318 (Table) (Ohio 2016), *reh'g denied*, 63 N.E.3d 158 (Table) (Ohio 2016). On January 11, 2017, Bryan filed an Ohio Supreme Court Rule 4.01 Motion, accessing the identical and unique post-conviction forum that the Ohio Supreme Court opened to Kirkland to retroactively address the now clearly established federal law of *Hurst.* Bryan's filing mirrored the filing in *Kirkland*. *See State v. Bryan*, Ohio Supreme Court Case No. 2001-0253, Motion for Relief Pursuant to S.Ct.Prac.R. 4.01, (Jan. 12, 2017). He raised, as in *Kirkland*, a challenge to his death sentence premised upon the Ohio Supreme Court's reweighing to correct sentencing / mitigation phase errors and the now clearly established federal mandates of *Hurst*. *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."). On March 15, 2017, the Ohio Supreme Court denied merits relief in a summary decision. *See State v. Bryan,* 71 N.E.3d 296 (Table) (Ohio 2017).

V. Bryan Again Sought Federal Habeas Relief Based Upon The Ohio Supreme Court's Interpretation Of *Hurst* And The Denial Of Bryan's *Hurst* Claim On The Merits.

On March 14, 2018, Bryan filed a second-in-time first habeas petition. *Bryan v. Shoop*, United States District Court, N.D. Ohio, Case No. 1:18-CV-591. On June 12, 2018, the district court transferred the matter to the Sixth Circuit Court of Appeals as second or successive. RE 15; Pet. App. p. A-5 – A-6. Bryan sought a remand arguing that he was entitled to have the federal district court review the Ohio Supreme Court's interpretation of the federal constitution and merits denial of his *Hurst* claim. He argued that the state court's interpretation of federal constitutional law should be reviewed under § 2254(d) of the AEDPA statute. *In re: Bryan*, Sixth Circuit Court of Appeals, Case No. 18-3557, RE 10, Petitioner/Appellant Bryan's Motion To Remand Or In The Alternative Motion For Additional Briefing.

On February 19, 2019, a panel of the Sixth Circuit Court of Appeals, entered an Order declaring Bryan's *Hurst* petition second or successive under § 2244, and denied that Bryan met the filing requirement under § 2244(b), thus denying him permission to have his recently exhausted *Hurst* claim litigated in federal district court. While acknowledging Bryan's argument that until the Ohio Supreme Court applied *Hurst* retroactively and provided a state court forum within which to litigate *Hurst* claims, there was no available forum within which to exhaust such claims, the Court of Appeals ruled that this assertion of "ripeness" was not what was meant when

this Court discussed the concept of a second-in-time first petition in *Panetti v. Quarterman*, 551 U.S. 930 (2007). *In re: Bryan*, Sixth Circuit Case No. 18-3557, RE 13-1, Order, Pet. App. p. A-3.

The Sixth Circuit Court of Appeals indicated that the only federal habeas court with jurisdiction to address this claim was the United States Supreme Court:

> "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Congress, in § 2244(b), chose to limit the jurisdiction of district courts when dealing with second or successive petitions. It did not try to comparably limit the jurisdiction of the Supreme Court. **If Bryan wishes, he may try bringing his *Hurst* claim there, in an original habeas corpus petition. *See Felker v. Turpin*, 518 U.S. 651, 654, 658, 660-62 (1996).** But he may not bring it in district court without satisfying § 2244(b).

In re: Bryan, Sixth Circuit Case No. 18-3557, RE 13-1, Order, Pet. App. pp. A-3 – A-4 (emphasis added).

This original habeas corpus petition seeks relief based upon the ruling and advice of the Sixth Circuit Court of Appeals. Should this Court determine 28 U.S.C. § 2244 indeed bars the lower federal courts from reviewing Bryan's claim, this Court should address the merits as to whether the Ohio Supreme Court unreasonably applied the clearly established federal law announced in *Hurst* to ensure the uniform interpretation and application of federal constitutional law among the States.

REASONS FOR GRANTING THE WRIT

I. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION.

Modern original habeas jurisdiction flows from 28 U.S.C. § 2241, the general grant of habeas authority to federal courts, as well as the All Writs provisions in 28. U.S.C. § 1651. This Court's power to grant an extraordinary writ is very broad, but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Title 28 U.S.C. § 2244(b)(3)(E) prevents this Court from reviewing the Sixth Circuit's order denying Bryan leave to file a second habeas petition by appeal or writ of certiorari. The provision, however, has not repealed this Court's authority to entertain original habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 660 (1996). In *Felker*, this Court determined that AEDPA's provisions stripping its jurisdiction to review authorization denials did not apply to its original habeas jurisdiction.

Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus demonstrate (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Title 28 U.S.C. § 2254 also limits this Court's authority to grant relief, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker*, 518 U.S. at 662-63.

This is Bryan's last and only opportunity for federal review of a state court's merits decision that his federal constitutional rights were not violated, and that he may therefore lawfully be put to death. Despite finding pervasive prosecutorial

misconduct tainted the jury's deliberations, the justices of the Ohio Supreme Court upheld Bryan's death sentence by substituting their appellate judgment for that of Bryan's jury and condemned him to death based on their independent review of the facts of his case and independent reweighing of the aggravating circumstances versus mitigating factors in his case. These are exceptional circumstances considering further that the Sixth Circuit's decision barring review of Bryan's subsequent federal habeas petition pursuant to 28 U.S.C. § 2244 admittedly renders a certain class of federal constitutional claims – those that a state court voluntarily adjudicates retroactively – unreviewable by any federal court save, perhaps, this Court through its original writ jurisdiction.

II. THE APPELLATE REWEIGHING PROCESS OHIO COURTS ENGAGE IN VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION REGARDING EVERY FACT NECESSARY TO IMPOSE CAPITAL PUNISHMENT.

A. Appellate reweighing is no longer constitutional in light of *Hurst*, which cannot be reconciled with *Clemons v. Mississippi*, 494 U.S. 738 (1990).

Hurst addressed whether, when a capital defendant invokes his Sixth Amendment jury trial right, he is entitled to have a jury find every fact statutorily required for imposition of a death sentence. 136 S. Ct. at 619 (holding, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). *Hurst* dealt with a scheme wherein a defendant could not receive a death sentence absent a finding that at least one aggravating circumstance applied to the crime **and** that the aggravation outweighed any mitigation presented. *Id* at 622. In that context, the *Hurst* Court reaffirmed that a defendant is entitled to a jury

determination of **every** fact necessary to impose a death sentence. This holding expanded *Hurst*'s reach beyond that of *Ring v. Arizona*, 536 U.S. 584 (2002) because *Hurst* presented a death penalty scheme wherein the judge usurped not only the jury's fact-finding role, but also its weighing function. *See* 136 S. Ct. at 622 ("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.'") (citations omitted) (emphasis in original; bold emphasis added)).

Hurst's expansion of the *Ring* Court's holding has a significant impact on *Clemons*, a case that *Ring* expressly declined to address. *See* 536 U.S. at 597 n.4 ("Ring's claim is tightly delineated . . . [h]e does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after the court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745 [.]"). Thus, subsequent to *Ring* and prior to *Hurst*, *Clemons* remained good law. However, there is no reconciling *Hurst*'s holding with that of *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.").

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

> *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, the *Hurst* Court expressly overruled *Spaziano* and *Hildwin*, and held that "[t]ime and subsequent cases have washed away [their] logic." *Hurst*, 136 S. Ct. at 623-624. Consequently, in any state that allows reweighing, the act of reweighing is tantamount to the Florida scheme's act of substituting the fact-finding of twelve jurors with that of a sentencing judge. An appellate court acting in its capacity to review a case is not the equivalent of twelve common citizens considering and giving varying weight to the aggravating versus mitigating circumstances in a case. The defendant's jury trial right is violated when that twelve-person determination is usurped by the independent reweighing of an appellate court in order to uphold the defendant's death sentence because the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence. *Id.* at 619.

B. *Hurst* invalidates Ohio's interpretation and application of *Clemons* specific to Ohio's death penalty scheme.

Even if *Hurst* did not overrule *Clemons* or invalidate appellate reweighing in toto, *Hurst* invalidated Ohio's interpretation and application of *Clemons* specific to Ohio's death penalty scheme. In Ohio, the facts necessary to impose a death sentence

include the existence of any statutory aggravating circumstances **and** whether those aggravating circumstances are sufficient to outweigh the defendant's mitigation evidence **beyond a reasonable doubt**. That the Ohio statute requires the jury to make its weight finding beyond a reasonable doubt illustrates the Ohio legislature's regard for this determination as a factual one rather than a mere moral decision.

The Ohio death penalty statute explicitly state, if an offender is found guilty of both the charge and one or more of the aggravating specifications:

> [T]he trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of [several possible life sentences].
>
> * * *
>
> If the trial jury recommends that the offender be sentenced to life imprisonment . . . the court shall impose the sentence recommended by the jury upon the offender.

Ohio Rev. Code Ann. § 2929.03(D)(2). This statutory construction means that the jury cannot recommend, and the defendant therefore is ineligible to receive, a death sentence without a weighing determination by the jury that the aggravating circumstances of the conviction outweigh any mitigation presented.

The Ohio statute goes on to require that:

> [I]f, 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 . . . 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 [several possible life sentences].

Ohio Rev. Code Ann. § 2929.03(D)(3). By the Ohio statute's construction, the jury's weight determination gives the state the authority to impose a death sentence on the defendant thereby rendering the defendant death-eligible, but gives the trial judge the authority to override the jury determination in favor of life, a matter of selection.

It is well settled that "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 v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* Court held that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Ring*, 536 U.S. at 588-89 (describing *Apprendi*'s holding). In Ohio, based upon the plain language of the Ohio death penalty statute, a life sentence is the maximum sentence that can be imposed based solely on the jury's verdict finding a defendant guilty of both the charged offense and the statutory aggravator(s) associated with the charge. Without further findings beyond this basic verdict, the jury cannot recommend and the state cannot impose a death sentence. *See* Ohio Rev. Code Ann. § 2929.03(D)(2) (absent a finding that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, by proof beyond a reasonable doubt, the jury **shall** recommend that the offender be sentenced to one of several possible life sentences, and the trial court **shall** impose the sentence recommended by the jury). Thus, after rendering a guilty

verdict, unless and until the jury finds that aggravation outweighs mitigation, the maximum punishment the jury's verdict exposes an Ohio defendant to is the mandatory imposition of one of several life sentences.

Once an Ohio jury determines that aggravation outweighs mitigation beyond a reasonable doubt, the jury **shall** recommend a death sentence. Ohio Rev. Code Ann. § 2929.03(D)(2). This recommendation exposes the defendant to the maximum possible punishment in relation to his crime, death. However, after the jury determines, by finding aggravation outweighs mitigation, that the defendant **can** (and indeed **shall**) be sentence to death, Ohio's statute leaves the decision of whether or not the defendant **will** receive a death sentence in the hands of the trial court. *See* Ohio Rev. Code Ann. § 2929.03(D)(3) (upon receiving the jury's death verdict, the trial court must independently determine whether aggravation outweighs mitigation and impose **either** a life sentence or death sentence accordingly). Thus, under Ohio's death penalty scheme, the jury's eligibility determination – the finding of every fact necessary to impose a death sentence in Ohio – does not conclude until the jury finds that aggravation outweighs mitigation beyond a reasonable doubt. At that point, having been exposed to the maximum possible penalty of death, the defendant moves on to the selection phase, which rests with the trial court.

The *Hurst* Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Thereafter, the *Hurst* Court held that Florida's law violated *Ring* because, under the Florida statute, a defendant was not eligible for death until the trial judge made

findings regarding the sufficiency of aggravating circumstances, mitigating circumstances, *and the relative weight of each*. *Id.* (Emphasis in original; bold emphasis added). On remand, the Florida Supreme Court explained that, because Florida law requires a finding that aggravating circumstances outweigh mitigation before a death sentence may be imposed, *Hurst* requires that finding be made by a jury. *Hurst v. State*, 202 So. 3d 40, 54 (2016).

Like Florida, Ohio's death penalty scheme explicitly requires that the trier of fact find aggravating circumstances outweigh any mitigation presented before a death sentence may be imposed. This structure places the jury's weighing determination among the factual findings on which the Ohio legislature conditions an increase in a defendant's maximum possible punishment from life imprisonment to death. In a weighing scheme like Florida's or Ohio's, where the jury's weight determination directly affects the defendant's death eligibility, the *Hurst* Court's clearly established federal law that a jury must find each fact necessary to impose a sentence of death invalidates the *Clemons*-based appellate reweighing procedure whereby an appellate court substitutes its judgment regarding the weight of aggravation versus mitigation for that of the jury to "cure" errors that may have influenced the jury's weight determination. Thus, post-*Hurst*, Ohio appellate courts can no longer rely on *Clemons* to use reweighing to rectify the type of error that took place in Bryan's case and substitute its judgment for that of the jury in a capital sentencing scheme wherein the weighing determination directly affects the defendant's death-eligibility (as opposed to mere selection). Accordingly, the appellate reweighing used by the Ohio Supreme Court to uphold Bryan's death sentence in the face of a jury verdict admittedly tainted by

prosecutorial misconduct violated Bryan's right to a jury determination regarding every fact necessary to impose capital punishment.

The reviewing courts in Bryan's case could not sufficiently guarantee that the extensive prosecutorial misconduct detailed in this case did not persuade at least one of Bryan's twelve jurors to vote for death where that juror would otherwise have voted life. Once the reviewing courts determined that the jury's finding that aggravation outweighed mitigation was unreliable due to the potential prejudice caused by prosecutorial misconduct, the weight determination was nullified. At that point, life in prison was the maximum sentence Bryan could receive under Ohio law absent a non-defective jury finding that aggravation outweighed mitigation. *See* R.C. 2929.03(D)(2). However, the Ohio Supreme Court has consistently claimed to cure errors through 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, 555 N.E.2d 253, 303-305 (1990) (consideration of invalid aggravating circumstances was sentencing error cured by appellate reweighing). These cases lead back to the Ohio Supreme Court's now unreasonable reliance on *Clemons*.

Under *Hurst*, having found constitutional error took place during the sentencing phase of Bryan's trial specific to the weighing of aggravators versus mitigators, the appellate court could not "cure" the error by reweighing based upon a cold record. *Hurst* mandates, as a matter of clearly established federal law, only a

jury can make the determinations that render an individual death eligible. In Bryan's case, it was the weighing of aggravating circumstances and mitigating factors by the **reviewing court** that unconstitutionally and unreasonably rendered Bryan death eligible. *See also Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (Court applied *Sawyer* **eligibility** exception to Ohio's weighing of aggravation versus mitigation). The appellate court's conduct of reweighing to "cure" sentencing phase errors has now been invalidated by the clearly established federal law of *Hurst* and retroactively applied by *Kirkland*.

Notably, in a claim substantially similar to Bryan's *Hurst* claim, the Ohio Supreme Court gave Kirkland relief in the form of a new sentencing hearing. In so doing, the court correctly and necessarily found that *Hurst* invalidated its prior holding that its independent reweighing of the aggravating and mitigating factors in Kirkland's case could cure the damage done. Nevertheless, the Ohio Supreme Court denied Bryan's claim. That decision was an unreasonable application of clearly established federal law. Now, without the intervention of this Court, Bryan stands to be executed notwithstanding the fact that the Ohio Supreme Court, federal district court, and Sixth Circuit Court of Appeals all agree that Bryan's constitutional rights were violated at trial where prosecutorial misconduct impermissibly influenced the jury's deliberations. Without the intervention of this Court, Bryan stands to be executed despite Ohio's retroactive application of *Hurst* in *Kirkland* evincing its conclusion that its reliance on *Clemons* reweighing is no longer constitutionally sound. Without the intervention of this Court, in these rare and exceptional

circumstances where the Sixth Circuit has held that no federal court may ever hear Bryan's claim, Bryan stands to be executed without any determination of whether Ohio's disparate application of *Hurst* to his case as compared to Kirkland's violated his federal constitutional rights.

III. THE SIXTH CIRCUIT'S HOLDING THAT § 2244 BARS FEDERAL REVIEW OF BRYAN'S CLAIMS CREATES A CLASS OF FEDERAL CONSTITUTIONAL CLAIMS THAT MAY NEVER RECEIVE FEDERAL COURT REVIEW.

A. If 28 U.S.C. § 2244 prevents federal habeas review of a state court's voluntary and independent retroactive application of a new rule of federal constitutional law, there is no recourse for federal courts to unify the States' interpretations of constitutional law, an exceptional circumstance that is contrary to the system of federalism and contrary to the precedent of this Court.

1. Federalism and AEDPA.

No decision of this Court has suggested federal habeas courts post-AEDPA must abdicate responsibility for interpreting how state courts adjudicate federal rights. Insofar as AEDPA is designed to promote comity, finality and federalism, it follows that its provisions must be interpreted to facilitate those interests. While comity most naturally exists between coequal sovereigns, federalism recognizes the supremacy of federal rights within the States. *Coleman v. Thompson*, 501 U.S. 722, 760 (1991) (Blackmun dissenting) ("Federal habeas review of state court judgments, respectfully employed to safeguard federal rights, is no invasion of state sovereignty.") (emphasis added.) Thus, even post-AEDPA, this Court has recognized that federal constitutional law still exists as a final buffer when the "merits" of federal rights are in play. Justice Stevens made this clear when asserting that AEDPA's

provisions cannot, as a matter of constitutional common sense, be interpreted such that "the Constitution means one thing in Wisconsin and another in Indiana." *Williams v. Taylor*, 529 U.S. 362, 387, n.13 (2000) (internal quotation marks and citations omitted).

In *Danforth* this Court declared that the "fundamental interest in federalism" is that which "allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—**so long as they do not violate the Federal Constitution**." *Id.* (Emphasis added.) As Justice Frankfurter pointed out in *Brown v. Allen*, 344 U.S. 443, 508 (1953), "[t]he State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.* (Frankfurter, J., separate opinion).

Danforth illustrates the respect federal courts must accord the States' responsibility for administering post-conviction review and interpreting federal constitutional law. Pursuant to principles of comity and federalism, the States are considered coequal partners in enforcing the Constitution, but this comes with the caveat that federal habeas courts must treat state courts as the **primary** forum for vindicating state petitioners' constitutional rights. *Williams*, 529 U.S. at 436–37 ("Comity . . . dictates that . . . the state courts should have the **first** opportunity to review this claim and provide any necessary relief.") (emphasis added); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) ("The federal habeas scheme leaves **primary** responsibility with the state courts for these judgments [as to the application of

federal law], and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.") (emphasis added). It was to that end that Congress codified the exhaustion requirement. *See* 28 U.S.C. § 2254(b)–(c). Significantly, and consistent with comity, § 2254(d) "demonstrates Congress' intent to channel prisoners' claims **first** to the state courts." *Pinholster*, 563 U.S. 170, 182 (2011) (emphasis added). The state adjudication on the merits should be the "'**main event**' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id*. at 186 (quotation marks omitted) (emphasis added).

In every instance, this Court's jurisprudence anticipates federal habeas review will follow the "main event," and there are no cases discernible in which this Court ever indicates that AEDPA requires an abdication of federal courts' responsibility to assure that the state courts neither "infringe on federal constitutional guarantees" nor "violate the Federal Constitution." *Danforth*, 552 U.S. at 280. To not allow that natural turn is to make States the final arbiters of constitutional law so that indeed the Constitution **can** mean one thing in Ohio, "one thing in Wisconsin and another in Indiana." 529 U.S. at 387, n.13.

2. The Sixth Circuit's interpretation of § 2244 is inconsistent with *Danforth* and States' sovereign authority to apply new rules of federal constitutional law retroactively.

That federal constitutional law as determined by the Supreme Court is binding upon state courts is a basic premise of our system of federalism. *See, e.g., Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016). Where retroactivity of such law is concerned, the *Danforth* Court held that state courts are free to make a new rule of constitutional

law retroactive with respect to state court convictions notwithstanding this Court's determination that the very same rule is not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Danforth* 522 U.S. at 279-81. The Court observed that the *Teague* rule "was intended to limit the authority of federal courts to overturn state convictions – not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State convictions." *Id.* at 280-81. Thus, the Court held, the retroactivity rules announced in *Teague* have no bearing on whether states can provide broader remedial relief in their own post-conviction proceedings than required by that opinion. *Id.* at 280-281. The Court's *Danforth* analysis drew a noted distinction between existing (even if newly recognized) constitutional **rights** and the scope of available **remedies**, and the *Danforth* Court made clear that states like Ohio can assess for themselves whether some new federal right is so important as to warrant a retroactive remedy. *Id.* at 288; *see also, Slack v. McDaniel*, 529 U.S. 473, 489 (2000). This is within any state's sovereign right to do.

In addressing federalism, the *Danforth* Court discussed its relatedness to comity and finality, which acknowledge States' sovereign interest in administering their criminal justice systems and preserving the finality of their judgments. Judgments become final to the extent state courts no longer provide a forum within which to properly litigate a claim. As the Ohio Supreme Court did in Bryan's case, and as this Court sanctioned in *Danforth*, comity allows for the State, as sovereign, to promote another value at the expense of its own final judgments. *Danforth*, 552 U.S. at 280 ("[F]inality of state convictions is a state interest, not a federal one."). The

finality interests underpinning § 2244 are not implicated where, as here, a state court voluntarily reverses the finality of its own conviction in order to retroactively apply new federal constitutional law not otherwise made retroactive by this Court.

Consistent with that understanding, the Ohio Supreme Court was within its sovereign right to revisit its own final judgments and provide Bryan (and Kirkland before him) a forum within which to seek a remedy for a constitutional violation implicating the right recognized in *Hurst*. Until then, Bryan's state court judgment was, for both state and federal habeas concerns, a final adjudication. Having been provided a forum within which to remedy (exhaust) a *Hurst* violation, Bryan litigated the new clearly established violation of his federal constitutional rights. He lost on the merits. Bryan then sought, naturally and consistent with our system of federalism, a federal court determination of whether the state court's adjudication of his federal rights was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d).

Consistent with *Teague* and *Danforth*, Bryan does not habeas corpus to seek a retroactive remedy for the violation of his constitutional rights; the State of Ohio has already given him a post-conviction forum within which he properly pursued said remedy. In adjudicating Bryan's *Hurst* claim on the merits, the Ohio Supreme Court reversed the finality of its own state court judgment, allowed for the possibility of a new sentencing phase trial, and ultimately denied Bryan's claim, effectively interpreting the federal Constitution and applying now clearly established federal law in the process. Neither *Danforth* nor any other precedent of this Court minimizes

the federal courts' ongoing fundamental responsibility to thereafter assure that the state court adjudication of Bryan's federal constitutional rights was a reasonable application of federal constitutional law.

Having exhausted his *Hurst*-based claim and received merits review in state court, Bryan is entitled to federal review as to whether his constitutional rights were unreasonably denied by the State of Ohio. If, as the Sixth Circuit held, § 2244 prohibits such review, it abrogates Supreme Court jurisprudence and deprives the federal courts of jurisdiction to exercise their duty to "say what the law is." *See Williams*, 529 U.S. at 378-79 (Justice Stevens emphasizing that "[w]hen federal judges exercise their federal-question jurisdiction under the 'judicial Power' of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is.' At the core of this power is the federal courts' **independent responsibility**--independent from the coequal branches in the Federal Government, and independent from the separate authority of the several states--to interpret federal law.") (citations omitted) (emphasis added); *see also Dickerson v. United States*, 530 U.S. 428, 444 (2000) (Congress may not legislatively "supersede this Court's decisions interpreting and applying the Constitution.").

The Circuit Court erroneously applied § 2244(b) to Bryan's habeas petition in a way that conflicts with this Court's jurisprudence interpreting the constitutional underpinnings of federalism. Simply put, § 2244 does not contemplate and is not applicable to cases where a state court voluntarily reverses the finality of a petitioner's conviction in order to retroactively apply a new rule of constitutional law

that this Court has not made retroactive. In those rare and exceptional circumstances, federal review pursuant to § 2254(d) must follow. Otherwise, the federal constitution is susceptible to differing state-by-state interpretations that can never be reconciled through federal review.

IV. THE SIXTH CIRCUIT'S HOLDING THAT THE CLAIMS RAISED BY BRYAN WERE NOT NEWLY RIPENED WILL CREATE THE KIND OF FAR REACHING AND PERVERSE RESULTS DENOUNCED BY THIS COURT IN *PANETTI* AND *MARTINEZ-VILLAREAL*.

A. Ripeness in this context is defined by this Court's holdings in *Martinez-Villareal* and *Panetti*.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the petitioner filed a habeas petition, which the district court adjudicated on the merits with the exception of one claim – the petitioner's *Ford* claim that he was incompetent to be executed. Following the conclusion of his federal litigation, the state issued a warrant for his execution. At that point, the *Ford* claim became "unquestionably ripe." *Id.* at 643. Thus, the setting of the execution date, (which is itself an act of state sovereignty), formed the factual predicate for the ripening of the claim, not any alleged deterioration in the petitioner's mental state. With the claim now ripe for litigation, the petitioner exhausted the claim in the state courts, which denied the claim on the merits. The petitioner then returned to federal court where this Court held the presentation of an unripe claim in a first federal habeas petition did not preclude presentation of the same claim in a second petition once ripened.

In *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007), this Court held that Congress did not intend the provisions of AEDPA addressing "second or successive"

petitions to govern a filing in the "unusual posture" of a § 2254 application raising a *Ford* claim filed independent of an original petition but as soon as that claim became ripe. The "unusual posture," was that the claim did not exist and could not be litigated until the fact of the petitioner's execution date was imminent. Only then would the claim ripen, understood as being the time when the petitioner could first litigate his claim in a state forum and exhaust the claim prior to timely invoking the federal court's jurisdiction under § 2254. Thereafter, the Court extended the holding of *Martinez-Villareal* to include newly ripened claims not previously raised and, again, the factual predicate for the ripening of the claim was the setting of the petitioner's execution date, not the underlying fact of the petitioner's mental state.

B. Viewing "ripeness" as defined in *Martinez-Villareal* and *Panetti*, Bryan's *Hurst* claim is newly ripe for federal habeas review.

The Circuit Court analyzed Bryan's claim pursuant to its own precedent regarding ripeness in the context of pre-enforcement review contesting a statute's implementation. *In re: Bryan*, Sixth Circuit Case No. 18-3557, RE 13-1, Order, Pet. App. p. A-3. Specifically, the court relied on its analysis of ripeness in *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997). Therein the court explained that the ripeness doctrine is a "justiciability doctrine" designed to "separate[] those matters that are premature because the injury is speculative or may never occur from those that are appropriate for the court's review." *Id*. at 279, 280. The court further explained, "the alleged injury must be legally and judicially cognizable," meaning that the plaintiff must have suffered an invasion of a legally protected interest

traditionally thought capable of resolution through judicial process and currently fit for judicial review. *Id*. at 280.

Ultimately, as to Bryan's claim, the Circuit Court held:

> Ripeness requires that the 'injury in fact be certainly impending.'" *NRA v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). Under Bryan's theory, he was injured when the Ohio Supreme Court independently reweighed aggravation and mitigation. That occurred in 2004, some seven years before he first reached federal court. Thus, recent ripeness does not remove Bryan's claim from § 2244's control because it is not recently ripe.

In re: Bryan, Sixth Circuit Case No. 18-3557, RE 13-1, Order, Pet. App. p. A-3. The Circuit Court's conclusion is not only inconsistent with *Panetti* and *Martinez-Villareal*, it is also inconsistent with the very precedent upon which the court relied.

First, the Sixth Circuit's analysis misstates the premise of Bryan's ripeness argument and ignores the similar posture of Bryan's habeas claim to the claims brought by the petitioners in *Martinez-Villareal* and *Panetti*. Specifically, the Sixth Circuit's reasoning relies on the facts underlying Bryan's claim – the Ohio Supreme Court's reweighing of aggravation versus mitigation in his case – to determine ripeness. In *Martinez-Villareal*, the setting of the execution date formed the factual predicate for the ripening of the petitioner's claim, not any underlying deterioration in the petitioner's mental state. Like the state's setting of the execution date in those cases, Ohio's retroactive application of *Hurst* and provision of a forum within which prisoners whose cases were previously final could litigate and exhaust *Hurst* claims on the merits unquestionably ripened Bryan's claim allowing him to exhaust the claim and placing him in a procedural posture to seek § 2254 merits review.

Until the Ohio Supreme Court's retroactive application of *Hurst*, Bryan's claim was not justiciable. While the injury caused by judicial reweighing may have been apparent at the time of his initial habeas petition, it was not legally cognizable until this Court's decision in *Hurst* called the Ohio Supreme Court's reliance on *Clemons* into question. The Ohio Supreme Court (apparently recognizing that concern) retroactively applied *Hurst* to Ohio in *Kirkland* and indeed found reweighing no longer constitutional. Once the federal law changed and *Hurst* recognized the constitutional right to have a jury find every fact necessary for imposition of a death sentence, Bryan still had no legal recourse and hence no judiciable claim pursuant to *Teague* unless and until one of two scenarios occurred: either this Court declared *Hurst* retroactive, **or** the state of Ohio retroactively applied *Hurst* opening a forum for post-conviction litigation of *Hurst* claims. *Danforth*, 552 U.S. 264 (holding that states may provide broader relief than *Teague* requires). The state of Ohio obliged, and that factual predicate allowed Bryan to obtain a state court merits review, thus ripening his *Hurst* claim for federal habeas review thereafter.

The relevant issue is whether the specific sovereign actions by the State of Ohio, permitting Bryan to litigate and exhaust a claim that was otherwise non-judiciable, form the factual predicate for assessing the ripeness of his *Hurst* claim much as the state court action of setting the execution date in *Martinez-Villareal* triggered the viability of his *Ford* claim. Once the state allowed him to exhaust the competency-to-be-executed claim in state court, this Court allowed him to subsequently seek federal habeas review in a second-in-time first habeas petition. As

the Sixth Circuit recognized, a claim must be both legally and judicially cognizable in order to ripen. 132 F.3d at 280. Before the retroactive application of *Hurst* by the Ohio Supreme Court, Bryan's claim was neither.

Thus, to say Bryan should have attempted to raise the claim in his first habeas petition is akin to the argument rejected by the *Panetti* Court that prisoners should prematurely raise a *Ford* claim in an initial habeas petition. The *Ford* claim at issue in *Martinez-Villareal* could not be litigated on the merits until the state set an immanent execution date because ripeness, although fact-driven, also has a temporal context. That temporal concern is part of the factual predicate necessary for a claim to become justiciable. Likewise, Bryan's claim was premature not legally cognizable or justiciable prior to *Hurst*'s ruling that a defendant is entitled to a jury determination of each fact necessary to impose death **and** Ohio's retroactive application of same. Bryan's *Hurst* claim ripened at its earliest on May 4, 2016, (the initial *Kirkland* ruling that recognized that Ohio Supreme Court Rule 4.01 would permit Kirkland and others to receive merits review of *Hurst* claims challenging previously final judgments), and at its latest on November 9, 2016, after the State's *Teague*-focused Motion to Reconsider was denied. *State v. Kirkland*, Case No. 1995-0042, entry dated May 4, 2016, *rehearing denied* entry dated Nov. 9, 2016. Thereafter, Bryan brought his near-identical *Hurst* appellate reweighing claim forward, sought and received state court merits review of the claim.

The ripeness of Bryan's claim is supported by the Ohio Supreme Court's actions in his case. Bryan properly filed a Rule 4.01 motion, the same procedure successfully

pursued by Kirkland, and alleged a near-identical *Hurst* violation regarding the prosecutorial misconduct in his case. Consistent with its consideration of Kirkland's filing, the Ohio Supreme Court did not rule Bryan's filing inappropriate or procedurally barred. It denied the claim on the merits in summary fashion. This is a presumptive merits ruling. *Harrington v. Richter*, 562 U.S. 86 (2011). If The court denied Bryan's claim for a timeliness basis, or for not properly being raised earlier, the court would have clearly expressed such a basis for the denial. This presumptive merits ruling is an implicit finding of ripeness.

With this understanding, the implication of denying Bryan federal habeas review is that this, and any other state court merits determination retroactively applying federal constitutional law, will forever escape federal review for "technical procedural reasons" wholly divorced from any "abuse of writ" concerns underlying the enactment of § 2244. *See Martinez-Villareal*, 523 U.S. at 644-45 (holding petitioner's claim neither second nor successive where petitioner could not bring the claim in his first petition for "technical procedural reasons" and attempt to bring in second petition did not implicate "abuse of writ"). Unless Bryan's claim otherwise falls outside of AEDPA's purview, the Sixth Circuit's interpretation of ripeness in relation to § 2244 obviates federal habeas review of a state's retroactive application of federal constitutional law thereby creating the far reaching and perverse result that a petitioner whom timely litigates and exhausts a federal constitutional claim pursuant to a state's retroactive application and creation of a forum within which to bring such

claims, will nevertheless be denied federal habeas review of the state's merits adjudication of his federal constitutional rights.

CONCLUSION

This Court should review the merits of Bryan's petition pursuant to the Court's original writ jurisdiction, declare the reweighing procedure engaged in by the Ohio Supreme Court unconstitutional, and grant Bryan the sentencing phase relief sought in the instant petition. Alternatively, this court should find that Bryan's petition is not subject to the restrictions of 28 U.S.C. § 2244 and transfer the petition to the district court for merits review, or find that Bryan's petition satisfies the ripeness exception detailed in *Panetti* and *Martinez-Villareal*, and transfer the petition to the district court for merits review.

Respectfully submitted,

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

/s/ Alan C. Rossman
ALAN C. ROSSMAN (0019893)
Assistant Federal Public Defender
BEVLYNN J. SLEDGE
Research and Writing Specialist
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856; (216) 522-1951 (facsimile)
alan_rossman@fd.org
bevlynn_joann_sledge@fd.org

Counsel for Petitioner Quisi Bryan