

Capital Case

Case No. 18-9659

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE QUISI BRYAN, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

On Petition For Writ Of Habeas Corpus

REPLY TO BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF HABEAS CORPUS

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**REPLY TO BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF HABEAS CORPUS**

I. Bryan's petition presents a significant issue of broad, general importance and exceptional circumstances that warrant this Court's attention.

Bryan's petition for writ of habeas corpus and related petition for writ of certiorari present questions of exceptional importance regarding the scope and meaning of federalism and whether any permissible circumstance exists wherein state courts may have the final say regarding what conduct does and does not violate the federal Constitution. If the Warden is correct, each time a state court retroactively applies new federal constitutional law as permitted by *Danforth v. Minnesota*, 552 U.S. 264 (2008), that application of federal law is not subject to any federal review. In essence, the Warden would create a certain class of claims – any federal constitutional claim to which a state gives broader retroactive effect than *Teague* requires – that cannot be reviewed by any federal court notwithstanding that the claim itself is based in federal law. Brief in Opposition at 9 (arguing, pursuant to *Danforth*, that when States choose to give broader retroactive effect to this Court's new rules, they do so as a matter of state law, not federal law.)

Initially, the Warden tries to get around this problematic scenario by claiming that the Ohio Supreme Court did not apply *Hurst v. Florida*, 136 S.Ct. 616 (2016), retroactively. Brief in Opposition at 9. The Warden claims Bryan previously made no response to this contention. *Id.* at 10. However, as Bryan pointed out in reply to the Warden's brief in opposition to Bryan's related petition for writ of certiorari, the Ohio Supreme Court necessarily applied *Hurst* retroactively both in *State v. Kirkland*, 49

N.E.2d 318 (Table) (Ohio 2016), and in its disposition of Bryan’s substantially similar Rule 4.01 motion for *Hurst*-based relief. Reply at 4-5, *Bryan v. Shoop*, No. 18-9372.

Specifically, this Court should take judicial notice of the Ohio Supreme Court’s orders in *Kirkland*, which are available electronically.¹ There, the Ohio Supreme Court granted Kirkland’s Rule 4.01 Motion wherein he argued that the Ohio Supreme Court’s use of reweighing to cure the effect of prosecutorial misconduct on the jury’s verdict violated his federal constitutional rights as clearly established by *Hurst*. Significantly, the Ohio Supreme Court issued its ruling a full year *after* Mr. Kirkland’s direct appeal concluded. *Id.* The actions of the Ohio Supreme Court occurred well after Kirkland’s conviction became final. In granting Mr. Kirkland relief, the Ohio Supreme Court implicitly held that, in Ohio, *Hurst* can be applied retroactively. Although the Ohio Supreme Court did not explicitly enunciate this holding, its retroactive application of *Hurst* to Mr. Kirkland’s *Hurst* claim signifies its decision to retroactively apply it. Moreover, the Ohio Supreme Court’s implicit holding is clear because the sole claim raised by Mr. Kirkland was the violation of his Sixth Amendment rights under *Hurst*.²

¹ See <https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2010/0854> (last visited on 08/12/2019).

² See *Kirkland*, 49 N.E.2d 318 (Table) (Ohio 2016), 3/ 3/ 2016, Appellant’s Motion for Order of Relief, https://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=789577.pdf (last visited 08/12/2019).

The Warden further cites *State v. Belton*, 74 N.E.2d 319 (Ohio 2016), for the proposition that the Ohio Supreme Court has not applied *Hurst* retroactively. Brief in Opposition at 9. The *Belton* Court, which addressed a defendant's contention that *Hurst* entitled him to jury sentencing notwithstanding that he waived his right to a jury trial, did not consider the issue of whether appellate reweighing violates *Hurst*. However, the constitutionality of appellate reweighing post-*Hurst* is the only issue raised by Kirkland, and subsequently by Bryan, which the Ohio Supreme Court considered and ruled on in granting Kirkland (and denying Bryan) relief.

It is also noteworthy that in *Kirkland* the State raised a *Teague* retroactivity argument initially as well as in a motion for reconsideration.³ The Ohio Supreme Court rejected the argument both times. The Ohio Supreme Court's sound rejection of the State's *Teague* argument removes all doubt about its intent to apply a substantive *Hurst* claim retroactively. The Warden neither denies nor contests Bryan's assertion that the Ohio Supreme Court engaged in merits review of his *Hurst* claim and provided merits relief on Kirkland's substantially similar *Hurst* claim. Unexplained denials are presumptive merits rulings, *Harrington v. Richter*, 562 U.S. 86 (2011). Thus, the Ohio Supreme Court's unreasoned grant of relief in *Kirkland* represents a merits ruling retroactively applying *Hurst* in Ohio.

³ See *Kirkland*, Case No. 2010-0854, 5/12/2016, State of Ohio's Motion for Reconsideration, pp. 4-5, http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=798594.pdf (last visited 08/12/2019).

Next, the Warden argues that, even if the Ohio Supreme Court applied *Hurst* retroactively, it did so as a matter of state, not federal law. Brief in Opposition at 9. This is where the Warden’s argument tips federalism on its head. Specifically, the Warden cites *Danforth* for the proposition that a state’s decision to apply federal constitutional law retroactively somehow transforms the matter of whether a petitioner’s federal constitutional rights were violated into a state law issue. *Id.*

In clarifying the nature and scope of federalism where retroactivity of federal constitutional law is concerned, the *Danforth* Court held that state courts are free to make a new rule of constitutional law retroactive, but that retroactive application must not infringe on federal constitutional guarantees or violate the Federal Constitution. 552 U.S. at 280. The Court’s *Danforth* analysis drew a noted distinction between existing (even if newly recognized) constitutional **rights** and the scope of available **remedies**. *Danforth* held that, although a state’s decision to provide a retroactive remedy by applying a newly recognized federal constitutional right retroactively is a matter of state law, the question of whether the right was indeed violated remains a question of federal constitutional law:

It is important to keep in mind that our jurisprudence concerning the “retroactivity” of “new rules” of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies. The former is a “pure question of federal law, our resolution of which should be applied uniformly throughout the Nation, while the latter is a mixed question of state and federal law.” *American Trucking Assns., Inc. v. Smith*, 496 U.S., at 205, 110 S.Ct. 2323 (STEVENS, J., dissenting).

Danforth, 552 U.S. at 290–91. The *Danforth* Court made clear that states like Ohio can assess for themselves whether some new federal right is so important as to

warrant their own courts' intervention in judgments they previously considered final. *Id.* at 288. This is within any state's sovereign right to do. However, as to the matter of the actual interpretation of federal constitutional law once a state has decided to apply such law retroactively, the *Danforth* Court held that the act of providing a remedy does not transform the claim from one of federal law to state law, and federal courts retain the final say on whether states have applied federal law correctly in accord with the Constitution.

If the Warden is correct that a state's retroactive application of federal constitutional law pursuant to *Danforth* transforms the issue into a matter of state law, then *Danforth* redefines federalism by carving out a niche of cases in which state courts may adjudicate prisoners' federal constitutional rights in a vacuum. This creates consistency issues from state to state and even within the same state.⁴ Whether *Danforth* indeed creates a class of cases that fall outside of federal review, with Bryan's being one such case, is a question of exceptional importance.

This Court will face this important jurisdictional question whether addressing the issue through the vehicle of certiorari or the instant original writ petition. The

⁴ For example, a petitioner could raise an identical *Hurst* claim to Bryan's on direct review. Said claim could receive an identical merits adjudication and proceed to federal habeas review. If the federal court finds the state court unreasonably applied the clearly established federal law of *Hurst*, that petitioner would get relief on the identical claim. However, solely because the State retroactively applied *Hurst* voluntarily in Bryan's case, Bryan would not be entitled to relief notwithstanding presenting the very same facts and recognized constitutional violation. Rather, the State's unreasonable application of *Hurst* to his case would go unchecked resulting in disparate merits application of federal constitutional law to prisoners within the same state with no recourse to unify or correct the erroneous application. This result would violate Due Process and the Equal Protections Clause to say the least.

Warden's contention that a state's retroactive application of federal constitutional law is strictly a matter of state law insulates the Ohio Supreme Court's decision in Bryan's case, and other decisions like it, from federal review of any kind. That would include this Court's ability to review Bryan's *Hurst* claim presented herein because, if the Warden's view of *Danforth* is credited, there would be no controversy involving a federal question. Thus, this Court cannot reach the merits of Bryan's claim that Ohio's practice of appellate reweighing to "cure" trial error in reliance on *Clemons v. Mississippi*, 494 U.S. 738 (1990) violates his federal constitutional rights as established by *Hurst* unless and until the Court resolves the *Danforth* issue of jurisdiction.

The Warden asserts that there are other avenues for review of state determinations of federal constitutional claims. Brief in Opposition at 15-16. However, the Warden ignores the fact that those other avenues for review do not present the same jurisdictional question, nor would review by any other avenue provide relief for the specific class of claimants Bryan finds himself amongst – any claimant whose federal constitutional claim a state court voluntarily adjudicates retroactively. This issue is of broad, general importance insofar as it is repugnant to our federal system of government to allow each State to define for itself the meaning of the federal Constitution.

II. Bryan is challenging the Ohio Supreme Court's direct, non-alternative ground for upholding his death sentence.

The Warden claims that the Ohio Supreme Court "rejected Bryan's argument under the plain-error standard, and then held *in the alternative*, that its reweighing

cured any prejudice.” Brief in Opposition at 13. This assertion ignores the fact that plain error review simply was not applied to all of Bryan’s claims. Some claims were preserved for merits review, and the Ohio Supreme Court used its professed power to “cure” trial error with *Clemons*-based error correction. With regard to the misconduct that occurred over defense objection, the Ohio Supreme Court made **no** finding of whether the prosecutor’s improper remarks prejudicially affected Bryan’s substantial rights **at the penalty phase**. The court found that at the guilt phase the prosecutorial misconduct complained of did not prejudicially affect Bryan’s substantive rights in view of the overwhelming evidence of his guilt. *State v. Bryan*, 804 N.E.2d 433, 460 (Ohio 2004). The court then used its independent assessment to “cure” any lingering impact of the prosecution’s statements as to the penalty phase. *Id.* at 464.

The use of reweighing based on *Clemons* to uphold Bryan’s death sentence violated his federal constitutional rights as articulated in *Hurst* and retroactively applied in *Kirkland*. He lost his sentencing-phase prosecutorial misconduct claim based on the court’s reweighing. The Sixth Circuit’s pre-*Hurst* disposition of the claim in habeas belies this fact. The court affirmed in reliance on *Clemons*, finding that:

The prosecutor’s alleged acts of misconduct were many. *See Bryan*, 804 N.E.2d at 463–65, ¶¶ 176–78, 180–86 (outlining them). Some the state supreme court held improper. *Id.* at 464, ¶¶ 180–82. The district court agreed.

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).

Bryan v. Bobby, 843 F.3d 1099, 1114 (6th Cir. 2016).

Moreover, the Ohio Supreme Court’s guilt-phase determination that Bryan’s substantive rights were not violated because of overwhelming evidence of his guilt is inapposite to the jury’s penalty-phase determination of whether aggravation outweighs mitigation. That reasoning therefore cannot support the court’s denial of the penalty-phase claim. Again, the court in fact sought to cure such lingering impact and uphold Bryan’s death sentence upon its independent review.

III. Bryan is challenging Ohio’s application of *Clemons*.

The Warden also defends Ohio’s death penalty scheme in general asserting that it is *Hurst* compliant. Brief in Opposition at 11-12. These arguments are inapposite. Bryan’s *Hurst* claim asserts that the Ohio courts’ practice of appellate reweighing to “cure” trial errors is unconstitutional in light of *Hurst*. He does not challenge the constitutionality of Ohio’s death penalty scheme in general.

As the Warden concedes, Brief in Opposition at 10-11, the factual findings necessary to impose a death sentence in Ohio 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. Brief in Opposition at 11. Following *Hurst*, the 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 others because the appellate court is thereby substituting its

judgment for that of the jury in a capital sentencing scheme wherein the weighing determination directly affects the defendant's death-eligibility.

Under *Hurst*, there was no valid jury fact finding in Bryan's case because, having found constitutional error to have taken place during the sentencing phase of his trial specific to the finding that aggravators outweigh mitigators, *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, and others, it was the weighing of aggravating circumstances and mitigating factors by the **reviewing court** that unconstitutionally and unreasonably determined death eligibility.

CONCLUSION

Based on the foregoing, this Court should grant Bryan's petition for writ of habeas corpus to decide the jurisdictional issue raised by *Danforth*'s holding that state courts may give broader retroactive effect to federal constitutional law than *Teague* requires and to determine whether the Ohio Supreme Court's application of *Clemons*-based error correction violates the federal constitutional rights clearly established in *Hurst*.

Respectfully submitted,

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