CAPITAL CASE

Case No. _____

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE MELVIN BONNELL, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
818 Grand Avenue, Suite 300
Kansas City, MO 64106
(816) 471-8282
Laurence_Komp@fd.org

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

ALAN C. ROSSMAN (0019893)
Capital Habeas Unit, Director
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

QUESTIONS PRESENTED FOR REVIEW

Bonnell's habeas petition presents exceptional circumstances that, if left unresolved, will cause 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 is correct, Bonnell 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 a state court's merits decision applying a new rule of constitutional law, once the state gives said rule broader retroactive effect than *Teague* requires, opens up federal review of the state court's application of clearly established federal law?

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

LIST OF PARTIES

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

LIST OF PROCEEDINGS

1. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Judgment: Guilty, 3/3/1988.

2. *State of Ohio v. Melvin Bonnell*, Case No. 55927 (Court of Appeals of Ohio, Eighth District, Cuyahoga County). – Judgment Affirmed 10/5/1989.

3. *State of Ohio v. Melvin Bonnell*, Case No. 89-2136 (Supreme Court of Ohio). – Judgment Affirmed 7/24/1991.

4. *Melvin Bonnell v. Ohio*, Case No. 91-6740 (Supreme Court of the United States) – Petition for Writ of Certiorari to the Supreme Court of Ohio Denied 2/24/1992.

5. *State of Ohio v. Melvin Bonnell*, Case No. 1994-1343 (Supreme Court of Ohio). – Appeal from App.R.26(B) Application (Murnahan Appeal) Denied 2/1/1994.

6. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Petition for Post-conviction Relief Denied 10/16/1995.

7. *State of Ohio v. Melvin Bonnell*, Case No. 69835 (Court of Appeals of Ohio, Eighth District, Cuyahoga County). – Petition for Post-conviction Relief Remanded 7/12/1996.

8. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Petition for Post-conviction Relief Denied on Remand 8/13/1997.

9. *State of Ohio v. Melvin Bonnell*, Case Nos. 69835, 73177 (Court of Appeals of Ohio, Eighth District, Cuyahoga County). – Denial of Petition for Post-Conviction Relief on Remand Affirmed 8/27/1998.

10. *State v. Bonnell*, Case No. 98-2113 (Supreme Court of Ohio). – Discretionary Jurisdiction Declined 1/20/1999.

11. *Bonnell v. Ohio*, Case No. 98-9618 (Supreme Court of the United States). – Petition for Writ of Certiorari to the Supreme Court of Ohio Denied 10/5/1999.

12. *Melvin Bonnell v. Betty Mitchel*, Case No. 00 CV 250 (United States District Court, N.D. Ohio). – Petition for Federal Habeas Relief Denied 2/4/2004.

13. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Application for DNA Testing Denied 10/18/2005.

14. *State of Ohio v. Melvin Bonnell*, Case No. 05-2284 (Supreme Court of Ohio). – Discretionary Jurisdiction Declined 4/17/2006.

15. *Melvin Bonnell v. Betty Mitchel*, Case No. 04-3301 (United States Court of Appeals, Sixth Circuit). –Denial of Federal Habeas Petition Affirmed 1/8/2007.

16. *Bonnell v. Ishee*, Case No. 07-6313 (Supreme Court of the United States). – Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit Denied 1/3/2007.

17. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Joint Motion for DNA Testing Granted 8/4/2008.

18. *State of Ohio v. Melvin Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Motion for Resentencing and to Enter Final Appealable Order Denied 1/4/2011.

19. *State of Ohio v. Melvin Bonnell*, Case No. 96368 (Court of Appeals of Ohio, Eighth District, Cuyahoga County). – Reversing and Remanding Denial of Resentencing Motion and Ordering Nunc Pro Tunc Entry 10/02/2014.

20. *State v. Bonnell*, Case No. 2011-2164 (Supreme Court of Ohio) – Declining Discretionary Review of Nunc Pro Tunc Entry Order 5/14/2014.

21. *State of Ohio v. Melvin Bonnell*, Case No. 102630 (Court of Appeals of Ohio, Eighth District, Cuyahoga County). – Dismissing Appeal from Trial Court Nunc Pro Tunc Entry 11/5/2015.

22. *State of Ohio v. Melvin Bonnell*, Case No. 89-2136 (Supreme Court of Ohio). – Motion for Order of Relief Pursuant to S.Ct.Prac.R. 4.01 Denied 12/28/2016.

23. *State v. Bonnell*, Case No. CR 223820 (Cuyahoga County Court of Common Pleas). – Application for DNA Testing Denied 4/6/2017.

24. *Melvin Bonnell v. Charlotte Jenkins*, Case No. 1:17-CV-787 (United States District Court, N.D. Ohio). – Petition for Federal Habeas Relief Transferred as Second or Successive 12/16/2017.

25. *State v. Bonnell*, Case No. 2017-1360 (Supreme Court of Ohio). – Denial of Application for DNA Testing Affirmed 10/10/2018.

26. *In Re: Melvin Bonnell*, Case No. 17-3886 (United States Court of Appeals for the Sixth Circuit). – Motion to Remand Denied, Permission to File Second or Successive Habeas Petition Denied 12/4/2018.

27. *Melvin Bonnell v. Ohio*, Case No. 18-8569 (Supreme Court of the United States). – Petition for Writ of Certiorari to the Supreme Court of Ohio Denied 5/28/2019.

28. Melvin Bonnell v. Tim Shoop, Case No. 18-9468 (Supreme Court of the United States). – Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit Denied 10/7/2019.

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Federal Statutes

State Statutes

Rules

Other Authority

OPINIONS BELOW

The Sixth Circuit's decision, *In re Melvin Bonnell*, 6th Cir. No. 17-3886 (Dec. 4, 2018), is reproduced at Pet. App. A-1. The Sixth Circuit's decision denying rehearing en banc, *In re Melvin Bonnell*, 6th Cir. No. 17-3886 (Feb. 27, 2019), is reproduced at Pet. App. A-5. The United States District Court's unpublished Order in *Bonnell v. Jenkins*, No. 1:17-CV-00787 (Aug. 25, 2017), is reproduced at Pet. App. A-6.

JURISDICTIONAL STATEMENT

Petitioner Melvin Bonnell timely filed a Petition for a Writ of Habeas Corpus in the United States District Court, Northern District of Ohio, on April 12, 2017. On August 25, 2017, the district court transferred Bonnell'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, Bonnell moved to remand the petition to the district court for merits review as a second-in-time first habeas petition.

On December 4, 2018, the Sixth Circuit Court of Appeals denied Bonnell's motion to remand and denied Bonnell permission to file a second or successive habeas corpus petition. Rehearing was also denied.

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, Bonnell states he has not applied to the district court because the circuit court prohibited such an application. Bonnell exhausted his State remedies for his *Hurst* claim and received a denial on the merits. Since Bonnell 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. Indeed, they have said that they will not review the matter.

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

When President William J. Clinton signed AEDPA into law in 1996, the President issued a Statement saying he would not have "signed this bill" if he thought the federal courts would "interpret[] [it] in a manner that would undercut meaningful Federal habeas corpus review." (Statement of the President of the United States upon Signing the Antiterrorism Bill (available in LEXIS, 32 Weekly Comp. Pres. Doc. 719 (White House, April 24, 1996))). He called upon "the Federal courts … [to] interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary." *Id.*

Consistent with this directive and understanding, this Court has repeatedly issued decisions that have construed or applied provisions of AEDPA in ways that respect and safeguard the core nature and functions of the writ. And this has been particularly true in this Court's capital jurisprudence. In this now significant body of jurisprudence, a majority of the Court has time and again demonstrated its commitment to the principle that AEDPA should not be interpreted to 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.). As Justice Breyer observed, the decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) and *Slack v. McDaniel*, 529 U.S. 473 (2000), reflect this Court's tendency to "assume that Congress

did not want to deprive state prisoners of first federal habeas corpus review" and the Court's practice of "interpret[ing] statutory ambiguities accordingly." *Duncan v. Walker*, 533 U.S. 167, 192 (2001) (Breyer, J., dissenting) (citing *Martinez-Villareal*, 523 U.S. at 645 and *Slack*, 529 U.S. at 487).

Against the backdrop of this precedent, the Sixth Circuit Court of Appeals' decision stands opposed because it denies Bonnell 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 is particularly egregious given this is a capital case, and Bonnell remains sentenced to death despite the grave concerns raised in this Original Writ. No court could stand in for Bonnell's jury, nor could any court ensure that the jury was not impermissibly influenced by the presence of a second, unmerged aggravating circumstance presented for the jury's consideration. In light of the Sixth Circuit's ruling that this Court is the only entity that can make a new rule retroactive, which is both offensive to federalism, and which contravenes *Danforth v. Minnesota*, 552 U.S. 264 (2008), Bonnell's last and only opportunity for federal review of his state court merits decision rests with this Court through its original writ jurisdiction.

STATEMENT OF THE CASE

I. The Trial.

On March 3, 1988, a jury convicted Bonnell of two counts of aggravated murder and related felonies for the death of Robert Eugene Bunner. According to the State's theory of the case, Shirley Hatch, Edward Birmingham, and Bunner shared an

apartment on Bridge Avenue in Cleveland, Ohio. *State v. Bonnell*, 573 N.E.2d 1082 (Ohio 1991). On November 28, 1987, at approximately 3:00 a.m., Hatch heard a knock at the kitchen door of the apartment. *Id.* When Bunner opened the door, Bonnell entered the apartment, uttered an expletive, and fired two gunshots at Bunner at close range. *Id.* Hatch woke Birmingham, who was asleep in another room, and Birmingham ejected the shooter from the apartment. *Id.* Bunner subsequently died from a gunshot wound to the chest. *Id.* at 180.

As permitted under Ohio law, the State charged Bonnell with two counts of aggravated murder for a single homicide. *Id.* Following the trial phase verdict and before beginning the sentencing phase, defense counsel objected and requested merger of the aggravated murder charges; nevertheless, the trial court failed to merge the counts pursuant to Ohio's allied offense statute, Ohio Rev. Code Ann. § 2941.25(A). *Id.* Ultimately, the jury recommended death. However, in doing so, the jury did not find Bonnell guilty of a capital offense because the trial court failed to instruct the jury on each element of the capital specification, which the State had to prove beyond a reasonable doubt, nor did the jury verdict form include all of the essential elements. Therefore, the jury's verdict never included a finding of every element necessary to convict Bonnell of the capital offense for which he was charged.

Specifically, Bonnell was indicted with a capital specification pursuant to Ohio Rev. Code Ann. § 2929.04(A)(7), which states in relevant part:

> The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing . . . aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal

> offender, committed the aggravated murder with prior calculation and design.

Id. As to the specification, the State was required to prove beyond a reasonable doubt that either Bonnell was the principal offender, or if not the principal offender, that he committed the murder with prior calculation and design. The jury was required to explicitly find whether the State met its burden on this element. However, in Bonnell's case, the jury was never charged with this element of the specification, and so they never made a finding thereon. Nevertheless, the trial court accepted the jury's critically flawed recommendation.

II. Direct Appeal And Habeas.

Bonnell sought relief on direct appeal in the Ohio Supreme Court. He argued that both the failure to merge the aggravated murder charges as well as the failure of the jury to find each element necessary to support his capital conviction were errors. The Ohio Supreme Court rejected Bonnell's claims. *State v. Bonnell*, 573 N.E.2d 1082 (Ohio 1991). However, one Justice ardently dissented:

> Bonnell was improperly sentenced to death twice for a single homicide in violation of R.C. 2941.25(A). As the statute provides, Bonnell was indicted and tried on two counts of aggravated murder: felony murder and premeditated murder. However, the counts were never merged and the trial court improperly sentenced him to death on both aggravated murder charges when there was in fact only a single murder. R.C. 2941.25(A); *State v. Brown* (1988), 38 Ohio St.3d 305, 317, 528 N.E.2d 523, 538; *State v. Huertas* (1990), 51 Ohio St.3d 22, 28-29, 553 N.E.2d 1058, 1066.
>
> **What disturbs me in this case is the possible effect this violation may have had upon the jury's determination of the appropriate sentence** pursuant to R.C. 2929.03(D)(2): "whether aggravating circumstances outweigh the mitigating factors present in the case." Because Bonnell was convicted on two counts of aggravated murder, the jury was

> confronted with two aggravating circumstances where there should have been one. **Particularly where Bonnell presented residual doubt as the only mitigating factor, we cannot say that the jury would not have considered, and been swayed by, the extra and improper aggravating circumstance when balancing against the single mitigating factor.**

Id. at 1089 (Brown, J., dissenting) (emphasis added).

On March 2, 2000, Bonnell timely filed a federal habeas petition. The district court denied said petition on February 4, 2004. *Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 718 (N.D. Ohio 2004). The Sixth Circuit affirmed the denial on January 8, 2007. *Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007). This Court denied certiorari on December 3, 2007. *Bonnell v. Ishee*, 522 U.S. 1064 (2007).

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

On January 12, 2016, this Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016). On May 4, 2016, the Ohio Supreme Court, as a unique act of state sovereignty, retroactively applied *Hurst* and granted penalty phase relief to a similarly situated death-row inmate in *State v. Kirkland*, 49 N.E.3d 318 (Ohio 2016), *reh'g denied*, 63 N.E.3d 158 (Table) (Ohio 2016). Specifically, the Ohio Supreme Court in *Kirkland* found that error may have influenced the jury's deliberations in his case, but rather than remand for a new sentencing hearing the court reweighed the aggravating and mitigating circumstances and, based on its independent review, upheld Kirkland's death sentence. Kirkland argued that, in light of *Hurst*, the appellate court's action of substituting its judgment for that of his jury violated his right to a jury determination of every fact necessary to impose death.

On November 4, 2016, Bonnell filed an Ohio Supreme Court Rule 4.01 Motion, accessing the identical and unique forum that the Ohio Supreme Court had opened in *Kirkland* to retroactively address the now clearly established federal law of *Hurst.* Bonnell's filing mirrored that procedural filing in *Kirkland*. *See State v. Bonnell*, Ohio Supreme Court Case No. 1989-2136, Motion for Order or Relief Pursuant to S.Ct.Prac.R. 4.01, (Nov. 4, 2016). He raised, as did *Kirkland*, a challenge to his death sentence premised upon the Ohio Supreme Court's reweighing to correct sentencing / mitigation phase errors based upon 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."). Over dissent, on December 28, 2016, the Ohio Supreme Court denied merits relief in a summary decision. *See State v. Bonnell*, 65 N.E.3d 776 (Ohio 2016).

IV. Bonnell Seeks Federal Habeas Relief Based Upon The Ohio Supreme Court's Interpretation Of *Hurst* And The Denial Of Bonnell's *Hurst* Claim On The Merits.

On April 12, 2017, Bonnell filed a second-in-time first habeas petition with the district court. *Bonnell v. Jenkins*, United States District Court, N.D. Ohio, Case No. 1:17-CV-00787. On August 25, 2017, the district court transferred the matter to the Sixth Circuit Court of Appeals as second or successive. RE 16. Bonnell sought to have the case remanded arguing that his petition was not second of successive, and the

district court should first review the Ohio Supreme Court's interpretation of the federal constitution and its merits denial of his *Hurst* claim. He argued that the state court's interpretation of federal constitutional law should be reviewed under the § 2254(d) provision of the AEDPA statute. *In re: Bonnell*, Sixth Circuit Court of Appeals, Case No. 17-3886, RE 10, Petitioner/Appellant Bonnell's Motion To Remand Or In The Alternative Motion For Additional Briefing.

On December 4, 2018, a panel of the Sixth Circuit Court of Appeals, entered an Order declaring Bonnell's *Hurst* petition to be a second or successive petition under § 2244. That court further denied that Bonnell met the filing requirement under § 2244(b), thus denying federal review of his *Hurst* claim notwithstanding that it was recently exhausted and reviewed on the merits in state court.

This original habeas corpus petition follows. Should this Court determine that 28 U.S.C. § 2244 does indeed bar the lower federal courts from reviewing Bonnell's claim as the Circuit Court held, this Court should address the merits as to whether the Ohio Supreme Court unreasonably applied the clearly established federal law announced in *Hurst*. This would ensure the uniform interpretation and application of federal constitutional law among the states, as there is no other avenue for federal review.

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, which is the general grant of habeas authority to federal courts, as well as from the All Writs provisions in 28. U.S.C. § 1651. This Court's power to grant an extraordinary writ is very broad but is 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 Court of Appeals' order denying Bonnell 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 that (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." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, 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.

Deprived of a review of the state court's merit determination, this is Bonnell's **only** opportunity for federal review of his state court's merits decision determining

that his federal constitutional rights were not violated, and that he may therefore lawfully be put to death. Despite the erroneous inclusion of a second aggravating circumstance for the jury's consideration, the justices of the Ohio Supreme Court upheld Bonnell's death sentence by substituting their appellate judgment for that of Bonnell's jury. They condemned him to death based on their independent review of the facts of his case, independent reweighing of aggravation versus mitigation, and independent finding of the existence of an aggravating circumstance that the jury never found. These are indeed exceptional circumstances demanding further review by this Court.

The Sixth Circuit's decision barring review of Bonnell's subsequent federal habeas petition pursuant to 28 U.S.C. § 2244 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. A STATE COURT'S VOLUNTARY RETROACTIVE APPLICATION OF FEDERAL CONSTITUTIONAL LAW BEGETS 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, the federal constitution will be interpreted differently in different states with no recourse for the federal courts to unify the varying interpretations; this is an exceptional circumstance that is contrary to the system of federalism and contrary to the precedent of this Court.

1. Federalism And AEDPA.

The federal habeas courts, even after the passage of AEDPA, are not to abdicate all responsibility for interpreting how the state courts adjudicate federal

rights, and no decision of this Court has suggested otherwise. Insofar as AEDPA is designed to specifically promote the goals of comity, finality and federalism, it follows necessarily 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.") Thus, even after the passage of 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 clarified this 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 described the relationship between state and federal courts in a simple, practical manner: "States are independent sovereigns with plenary authority to make and enforce their own laws **as long as they do not infringe on federal constitutional guarantees.**" 552 U.S. at 280. (Emphasis added.) The *Danforth* 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 are to accord the states' responsibility for administering post-conviction review and interpreting federal constitutional law. Under 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 are to treat the state courts as the **primary** forum for the vindication of 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 v. Cullen*, 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 that federal habeas review is understood to follow the "main event." There are no cases discernible in which this Court ever indicates that providing AEDPA deference, and an overriding concern for comity, infers an abdication of a federal court's responsibility to assure that the state courts neither "infringe on federal constitutional guarantees" or "violate the Federal Constitution." *Danforth*, 552 U.S. at 280. To not allow that natural turn is to make the state court the final arbiter of constitutional law so that indeed the Constitution **can** mean one thing in Ohio, "one thing in Wisconsin and another in Indiana." *Williams*, 529 U.S. at 387, n.13.

2. The Sixth Circuit's interpretation of § 2244 puts this Court's holding in *Danforth v. Minnesota*, 552 U.S. 264 (2008) and states' sovereign authority to apply new rules of federal constitutional law retroactively in conflict with the federal courts' duty to provide a unified interpretation of federal constitutional law.

This Court explained that a basic tenet of federalism is that federal constitutional law as determined by this Court is binding upon state courts. *See, e.g., Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). In clarifying the nature and scope of federalism where retroactivity of such law is concerned, this 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 280-81.

This Court's *Danforth* analysis recognized a distinction between existing (even if newly recognized) constitutional **rights** and the scope of available **remedies**. When a federal court decides not to retroactively apply a new rule under *Teague*, it limits the availability of federal habeas relief in that instance. *Id.* But while states have an interest in finality, they also have an interest in justice, 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 their own courts' intervention in judgments they previously considered final. *Id.* at 288 (finding "no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations"); *see also, Slack*, 529 U.S. at 489. This is within any state's sovereign right to do.

In addressing federalism, the *Danforth* Court discussed its relatedness to principles of comity and finality. Those concepts acknowledge a state's sovereign interest in administering its own criminal justice system and preserving the finality of its 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

Bonnell'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. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners are seeking a remedy for a violation of federal rights by their lower courts."). *Danforth* makes clear that it is within a states' sovereign authority to voluntarily give a new rule of federal constitutional law retroactive effect.

In such circumstances, two principles support the argument that the statutory provision of 28 U.S.C. § 2244 does not abrogate the jurisdiction of federal courts to review and address a state court's voluntary retroactive adjudication of a petitioner's federal constitutional claim. The first is that AEDPA did not purport to deprive or diminish federal courts of habeas corpus jurisdiction. *Williams*, 529 U.S. at 378 ("The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; [it] does not alter the underlying grant of jurisdiction in § 2254(a).") (citations omitted). The second is that 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 Bonnell (and Kirkland before him) a forum within which to seek a remedy for a sentencing phase violation implicating the right recognized by this Court in *Hurst.* Acting within the scope of its

sovereign authority, the Ohio Supreme Court permitted Bonnell to seek a remedy asking for a new sentencing phase hearing based solely upon constitutional rights articulated in *Hurst*. Until then, Bonnell'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 newly-recognized constitutional *Hurst* violation, Bonnell went forward and litigated the new clearly established violation of his federal constitutional rights. The Ohio Supreme Court could have bolted that door shut, but, instead, it chose to open it. Bonnell lost on the merits. Bonnell then sought, naturally and consistent with our system of federalism, a federal court determination of whether the state court's adjudication of Bonnell's federal rights was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d).

Consistent with both *Teague* and *Danforth*, Bonnell was not attempting to use the vehicle of habeas corpus to provide him a retroactive remedy for the alleged violation of his constitutional rights; the State of Ohio gave him a forum within which he properly pursued said retroactive remedy. In adjudicating Bonnell'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 Bonnell'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 judgment and adjudication of

Bonnell's federal constitutional rights was a reasonable application of federal constitutional law.

Having exhausted his *Hurst*-based claim and having received a merits review in state court, Bonnell 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 this Court's 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) (reaffirming the principle that Congress may not legislatively "supersede this Court's decisions interpreting and applying the Constitution.").

The Circuit Court erroneously applied 28 U.S.C. § 2244(b) to Bonnell'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 to retroactively apply a new rule of constitutional law that

the United States Supreme 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.

III. 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.[1]

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

In *Hurst*, this Court addressed the issue of whether, when a capital defendant invokes his Sixth Amendment jury trial right, he is entitled to have a jury find every fact statutorily required to impose 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 for imposition of a death sentence. This holding expanded *Hurst*'s reach beyond that of *Ring v. Arizona*, 536 U.S. 584 (2002)

[1] As this Court made clear in *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985), "appellate court[s], unlike a capital sentencing jury, [are] wholly ill-suited to evaluate the appropriateness of death in the first instance." Rather, it is the jury's sole and solemn responsibility to mete out life or death, and it is the appellate court's responsibility to guard against unconstitutional death verdicts, not to look upon cases, weigh their circumstances, and impose death in the first instance where a jury's finding is defective.

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 *Ring's* holding has a significant impact on *Clemons v. Mississippi*, 494 U.S. 738 (1990), 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 guiding courts regarding the constitutionality of independent reweighing. 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, in *Hurst*, this 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. Significantly, 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 623-24.

Consequently, in any state that allows reweighing, appellate 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 unceremoniously 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 sentence of death. *Hurst*, 136 S. Ct. at 619.[2]

[2] This Court has noted, "[t]he trial is the main event at which a defendant's rights are to be determined." *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (internal quotation marks omitted). It is "not simply a tryout on the road to appellate review." *Id.* (internal quotation marks omitted).

B. Ohio's appellate reweighing procedure is no longer constitutional in light of *Hurst*, which 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 and those like it. In Ohio, the facts necessary to impose a death sentence include the existence of statutory aggravating circumstances **and** whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating factors **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 high regard for this determination as a factual one, rather than a mere moral decision.

The Ohio death penalty statute explicitly states that, 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 determination gives the state the authority to impose a death sentence on the defendant, thereby rendering the defendant death-eligible. However, it 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.

The Ohio statute then goes on to require that 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 beyond a reasonable doubt, that the defendant **can** be sentenced to death, Ohio's death penalty 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*.

> [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. (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 in Florida, Ohio's death penalty scheme explicitly requires that the trier of fact find that 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.

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 Bonnell's case. Under *Hurst*, Ohio's appellate courts may not reweigh aggravating circumstances to cure a defect in the jury's weighing determination 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 (as opposed to mere selection). Accordingly, the appellate reweighing used by the Ohio Supreme Court to uphold Bonnell's death sentence in the face of a jury verdict tainted by the erroneous inclusion of an aggravator violated Bonnell's right to a jury determination regarding every fact necessary to impose capital punishment.

The reviewing courts in Bonnell's case could not sufficiently guarantee that the inclusion of the extra aggravator did not persuade at least one of Bonnell's twelve jurors to vote for death over life. Once the reviewing courts determined that the jury's

finding that aggravation outweighed mitigation in Bonnell's case was unreliable, the weight determination was nullified. At that point, life in prison was the maximum sentence Bonnell could receive under Ohio law absent a non-defective jury finding that aggravation outweighed mitigation beyond a reasonable doubt. *See* Ohio Rev. Code Ann. § 2929.03(D)(2); *State v. Belton*, 74 N.E.3d 319, 337 (Ohio 2016) ("[I]n Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence."). However, the Ohio Supreme Court has consistently relied upon *Clemons*'s authority 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*, there was no valid jury fact finding in Bonnell's case. Because a constitutional error took place during the sentencing phase of his trial specific to the weighing of aggravators versus mitigators, the appellate court could not just "cure" the error by reweighing based upon a cold record. *See Satterwhite v. Texas,* 486 U.S. 249, 262 (1988) (Marshall, J. and Brennan, J., concurring in part and concurring in judgment) ("Because of the moral character of a capital sentencing determination and

the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise."). *Hurst* mandates, as a matter of clearly established federal law, only a jury can make the determinations that render an individual death eligible. In Bonnell's case, the **reviewing court** unconstitutionally weighed the aggravating circumstance against the mitigating factors, rendering Bonnell 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*.

Moreover, there is a compounding *Hurst* problem in Bonnell's case because the jury never actually made a finding that Bonnell was either the principal offender or committed the aggravated murder with prior calculation and design. Therefore, the appellate courts not only reweighed aggravation versus mitigation in Bonnell's case; they also made the determination in the first instance that the State proved this specification of the charged aggravator beyond a reasonable doubt.

Notably, based on a *Hurst* claim, the Ohio Supreme Court gave Kirkland the relief of a new sentencing hearing. The Ohio Supreme Court in *Kirkland* specifically recognized that the act of reweighing to cure an error that may have affected the jury's deliberations when determining life or death violated Kirkland's right to a jury determination of every fact necessary to impose death. In so doing, the court correctly

and necessarily found that *Hurst* invalidated its prior holding that its independent reweighing of the aggravating circumstances and mitigating factors in Kirkland's case could cure the damage done. Nevertheless, the Ohio Supreme Court denied Bonnell's claim. That decision was an unreasonable application of clearly established federal law. Now, without the intervention of this Court, Bonnell stands to be executed despite Ohio's retroactive application of *Hurst* to Kirkland evincing its conclusion that its reliance on *Clemons* reweighing is no longer constitutionally sound. Without the intervention of this Court, in this rare and exceptional circumstance, where the Sixth Circuit held that no federal court may hear Bonnell's claim, Bonnell stands to be executed without any determination of whether Ohio's disparate application of *Hurst* to his case violated his federal constitutional rights.

CONCLUSION

This Court should review the merits of Bonnell's petition pursuant to the Court's original writ jurisdiction, declare the reweighing procedure engaged in by the Ohio Supreme Court unconstitutional, and grant Bonnell the sentencing phase relief sought in the instant petition. Alternatively, this Court should hold that a state court's merits decision applying a new rule of constitutional law, once the state decides to give said rule broader retroactive effect than *Teague* requires, must be reviewed by the federal courts. The Court should then transfer the petition to the district court for merits review to avoid a suspension of the writ.

Petitioner Melvin Bonnell further requests that this Court hold this case for review pending this Court's decision in *McKinney v. Arizona*, 139 S. Ct. 2692 (2019), which raises similar procedural issues the outcome of which may bear upon this case.

Respectfully submitted,

/s/ Laurence E. Komp
LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
818 Grand Avenue, Suite 300
Kansas City, MO 64106
(816) 471-8282
Laurence_Komp@fd.org

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

/s/ Alan C. Rossman
ALAN C. ROSSMAN (0019893)*
Capital Habeas Unit, Director
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 of Record*

Counsel for Petitioner Melvin Bonnell