

No. 19-6863

In the Supreme Court of the United States

IN RE MELVIN BONNELL,

Petitioner,

ON PETITION FOR WRIT OF HABEAS CORPUS

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

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CAPITAL CASE – EXECUTION SET FOR MARCH 18, 2021

QUESTION PRESENTED

1. Is Bonnell entitled to an original writ of habeas corpus based on the retroactive application of a decision to which neither the Supreme Court of the United States nor the Supreme Court of Ohio has given retroactive effect?

2. Does Ohio's capital-sentencing system violate *Hurst v. Florida*, 136 S. Ct. 616 (2016), even though it prohibits courts from sentencing defendants to death based on facts not found by a jury?

LIST OF PARTIES

The Petitioner is Melvin Bonnell, a capital inmate at the Chillicothe Correctional Institution. Bonnell is scheduled to be executed on March 18, 2021.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered March 29, 1988) (conviction).
2. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered October 5, 1989) (direct appeal).
3. *State v. Bonnell*, No. 1989-2136 (Ohio Supreme Court) (judgment entered July 24, 1991; reconsideration denied September 18, 1991) (direct appeal).
4. *Bonnell v. Ohio*, No. 91-6740 (U.S. Supreme Court) (*certiorari* denied February 24, 1992) (direct appeal).
5. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered May 6, 1994; reconsideration denied February 1, 1995) (application for reconsideration).
6. *State v. Bonnell*, No. 1994-1343 (Ohio Supreme Court) (judgment entered December 20, 1994) (application for reconsideration).
7. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered October 16, 1995; on remand for clarification, judgment entered August 13, 1997) (postconviction).
8. *State v. Bonnell*, Nos. 69835, 73177 (Ohio Court of Appeals, Eighth District) (judgment entered August 27, 1998) (postconviction).
9. *State v. Bonnell*, No. 1998-2113 (Ohio Supreme Court) (judgment entered January 20, 1999; reconsideration denied March 3, 1999) (postconviction).
10. *Bonnell v. Ohio*, No. 98-9618 (U.S. Supreme Court) (*certiorari* denied October 4, 1999) (postconviction).
11. *Bonnell v. Mitchell*, No. 00CV250 (U.S. District Court for the Northern District of Ohio) (judgment entered February 4, 2004) (first habeas petition).
12. *State v. Bonnell*, CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (first application for DNA testing denied October 21, 2005).
13. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (appeal denied March 29, 2006) (first application for DNA testing).

14. *State v. Bonnell*, No. 87337 (Ohio Court of Appeals, Eighth District) (appeal dismissed August 3, 2006) (constitutionality of DNA testing statute).
15. *State v. Bonnell*, No. 2006-1739 (Ohio Supreme Court) (appeal denied December 27, 2006) (constitutionality of DNA testing statute).
16. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered January 8, 2007) (first habeas petition).
17. *Bonnell v. Ishee*, No. 07-6313 (U.S. Supreme Court) (*certiorari* denied December 3, 2007) (first habeas petition).
18. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (motion to recall mandate denied November 20, 2009) (first habeas petition).
19. *Bonnell v. Bobby*, No. 09-9186 (U.S. Supreme Court) (*certiorari* denied June 1, 2010) (motion to recall mandate in first habeas petition).
20. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered January 3, 2011) (motion for resentencing).
21. *State v. Bonnell*, No. 96368 (Ohio Court of Appeals, Eighth District) (judgment entered November 10, 2011) (motion for resentencing).
22. *State v. Bonnell*, No. 2011-2164 (Ohio Supreme Court) (appeal denied May 14, 2014; reconsideration denied September 24, 2014) (motion for resentencing).
23. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (*nunc pro tunc* entry January 20, 2015).
24. *State v. Bonnell*, No. 102630 (Ohio Court of Appeals, Eighth District) (judgment entered November 5, 2015) (appeal of *nunc pro tunc* entry).
25. *State v. Bonnell*, No. 2015-2047 (Ohio Supreme Court) (appeal denied March 15, 2017) (appeal of *nunc pro tunc* entry).
26. *State v. Bonnell*, No. 2017-0115 (Ohio Supreme Court) (appeal dismissed April 6, 2017) (second appeal of first application for DNA testing).
27. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (application for reopening denied April 19, 2017) (first application for DNA testing).

28. *State v. Bonnell*, CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (second application for DNA testing denied August 14, 2017).
29. *Bonnell v. Jenkins*, No. 1:17-cv-787 (U.S. District Court for the Northern District of Ohio) (judgment entered August 25, 2017) (second habeas petition).
30. *State v. Bonnell*, No. 2017-1360 (Ohio Supreme Court) (judgment entered October 10, 2018) (second application for DNA testing).
31. *In re Bonnell*, No. 17-3886 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered December 4, 2018) (second habeas petition).
32. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (motion for new trial denied January 25, 2019).
33. *State v. Bonnell*, No. 108209 (Ohio Court of Appeals, Eighth District) (appeal docketed February 14, 2019; ongoing) (motion for new trial).
34. *Bonnell v. Ohio*, No. 18-8569 (U.S. Supreme Court) (*certiorari* denied May 28, 2019) (second application for DNA testing).
35. *Bonnell v. Ohio*, No. 18-9468 (U.S. Supreme Court) (*certiorari* denied October 7, 2019).

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INTRODUCTION

Three decades ago, Melvin Bonnell knocked on an apartment door at 3 a.m. When Robert Bunner opened the door, Bonnell entered uninvited, pulled out a gun, and shot Bunner in the chest and groin. Bonnell then sat on Bunner, repeatedly striking his face until one of Bunner's roommates was able to throw Bonnell out of the apartment. Bunner died from his injuries.

After an Ohio jury convicted Bonnell of aggravated murder and aggravated burglary, an Ohio trial court sentenced Bonnell to death for the aggravated murder and imposed a sentence of ten-to-twenty-five-years' imprisonment for the aggravated burglary. Bonnell spent most of the next two decades unsuccessfully challenging his convictions and sentences on direct appeal, in state-postconviction proceedings, and in a federal habeas proceeding.

After the Sixth Circuit denied Bonnell's latest attempt at obtaining habeas relief, Pet.App.1, Bonnell petitioned this Court for a writ of *certiorari*. The Court denied his petition on October 7, 2019. *Bonnell v. Ohio*, 139 S. Ct. 2644 (2019). A few months later, Bonnell filed a petition for a writ of habeas corpus—the petition at issue here. Bonnell now claims that his death sentence is invalid because Ohio's system for adjudicating capital sentences violates *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Hurst* does not apply retroactively, and Bonnell should not be able to raise it to collaterally attack his sentence. But Bonnell claims that he can raise a *Hurst* issue in collateral proceedings because Ohio's Supreme Court has made *Hurst* retroactive “as a unique act of state sovereignty.” Pet.8. Since the Ohio Supreme

Court voluntarily made *Hurst* retroactive, Bonnell contends, this Court can apply *Hurst* to his case.

The Court should deny Bonnell's request for relief. This Court will grant a petition for an original writ of habeas corpus only in "exceptional circumstances." *See* Sup. Ct. R. 20.4(a). This case does not meet that standard. *Hurst* does not apply retroactively as a matter of federal law. So, to prevail here, Bonnell would have to show (at least) that it applies retroactively as a matter of *state* law. But Ohio's state courts have not given *Hurst* retroactive effect—Bonnell's contrary argument turns on an inference from a summary remand in which the Ohio Supreme Court issued no opinion explaining its reasoning. In any event, Ohio's capital-sentencing scheme does not violate *Hurst*.

In addition, Bonnell should lose because he needlessly delayed in seeking the original writ—he waited until just three months before his execution was scheduled to take place, even though he could have filed his petition years earlier after *Hurst*, or months earlier alongside his petition for a writ of *certiorari*. Habeas relief is governed by equitable principles. And courts should deny equitable relief to parties who sleep on their rights. That is particularly true in death-penalty cases, where courts have an obligation to stop parties from using late-raised legal challenges "as tools to interpose unjustified delay." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

STATEMENT

1. Robert Bunner and his roommates, Ed Birmingham and Shirley Hatch, spent much of November 27, 1986 partying in their Cleveland, Ohio apartment.

State v. Bonnell, No. 55927, 1989 Ohio App. LEXIS 4982, at *2 (Ohio Ct. App. Oct. 5, 1989). Birmingham went to bed at 8:30 p.m., but the others stayed up.

At around 3:00 a.m., Hatch heard a knock on the back door. The knocker identified himself as “Charlie.” But Hatch could not see through the peephole who the person was, so she called Bunner over to the door. Bunner opened it and “Charlie” entered uninvited. Once inside, “Charlie” pulled out a gun, uttered an expletive, and shot Bunner twice at close range, striking him in his chest and groin. “Charlie” then turned towards Hatch, but she managed to escape to Birmingham’s bedroom. After Hatch woke up Birmingham, the pair left the bedroom and found “Charlie” sitting on top of Bunner, striking him repeatedly in the face. *Id.* at *2–3. Birmingham pulled “Charlie” off Bunner, and threw him out the apartment door and down a flight of steps, while Hatch called the police and an ambulance. *Id.* at *3. Bunner later died from his injuries.

Around a half hour later, two Cleveland police officers spotted a car nearby, traveling backwards with its headlights off. They attempted to stop the car, but it turned and sped away. The police officers gave chase, and the fleeing car crashed into the side of a funeral home. *Id.* Emergency personnel took the driver, Melvin Bonnell, to the hospital. *Id.* at *4.

Police later realized that Bonnell matched Birmingham’s and Hatch’s descriptions of Bunner’s murderer. *Id.* at *3–4. They brought Birmingham to the hospital, and he identified Bonnell as Bunner’s murderer. *Id.* at *4. Police also found a .25-caliber automatic pistol at the funeral-home crash scene and were able

to confirm that it was the same gun used to fire the bullets found in Bunner's body. *Id.*

Bonnell later admitted that he had been at Bunner's apartment that morning, but said that he was there with his friend, Joe Popil, and had remained in the car while Popil went inside with a gun. Bonnell said Popil returned to the car with the gun, but that Bonnell had then passed out from alcohol and did not remember anything else until he awoke in the hospital. But he apparently had no explanation for why he was the only one in the car with the gun fleeing police shortly after Bunner's murder. *Id.* (Popil confirmed he had been drinking with Bonnell earlier that night, but said he had gone home at 11:30 p.m., hours before the murder. *Id.*)

An Ohio jury convicted Bonnell of aggravated murder and aggravated burglary. *Id.* at *1. Following the jury's recommendation, the trial court sentenced Bonnell to death for the aggravated murder. *Id.* at *1–2. And it later sentenced Bonnell to ten-to-twenty-five-years' imprisonment for the aggravated burglary. *Id.* at *20.

2. Bonnell appealed, raising thirty purported errors relating to his aggravated-murder and aggravated-burglary convictions. *See id.* at *43–51. The Ohio Court of Appeals largely rejected Bonnell's assignments of error, but remanded to the trial court to resentence Bonnell for the aggravated burglary. *Id.* at *20, *42. The trial court did so later that month. *See State v. Bonnell*, No.69835 & 73177, 1998 Ohio App. LEXIS 3943, *6 (Ohio Ct. App. Aug. 27, 1998).

Bonnell then appealed to the Ohio Supreme Court, this time raising twenty-nine purported errors. *See State v. Bonnell*, 61 Ohio St. 3d 179 (1991). The Ohio Supreme Court rejected them all. And, as required by state law, it “independently review[ed] the death sentence for appropriateness and proportionality.” *Id.* at 186. The Court upheld the sentence. It found “that the aggravating specification of which the appellant was found guilty [was] clearly shown by the record,” and that Bonnell had “present[ed] no credible mitigating evidence.” *Id.* at 186–87. Further, the Court reviewed the record on its own and agreed with the intermediate court of appeals that it contained no mitigating evidence. *Id.* “Therefore,” it concluded, “the aggravating circumstance outweighs evidence presented in mitigation beyond a reasonable doubt.” *Id.* at 187. Bonnell petitioned this Court for *certiorari*, but it denied his request. *Bonnell v. Ohio*, 502 U.S. 1107 (1992).

That direct appeal was just the beginning of Bonnell’s many challenges to his convictions and sentences. An abbreviated summary follows: After this Court denied *certiorari* in 1992, Bonnell sought delayed reconsideration in the state courts. He raised fifty-five purported errors. The Ohio Court of Appeals denied reconsideration, and the Ohio Supreme Court affirmed. *See State v. Bonnell*, 71 Ohio St. 3d 223 (1994). At that point, Bonnell filed a state-postconviction petition, raising fifty-three claims for relief. After the trial court summarily dismissed the petition, Bonnell appealed. *State v. Bonnell*, Nos. 69835 & 73177, 1998 Ohio App. LEXIS 3943 (Ohio Ct. App. Aug. 27, 1998). The Ohio Court of Appeals affirmed, *id.*, and the Ohio Supreme Court dismissed Bonnell’s attempted appeal because it raised “no

substantial constitutional question,” *State v. Bonnell*, 84 Ohio St. 3d 1469 (1999). This Court again denied *certiorari*. *Bonnell v. Ohio*, 528 U.S. 842 (1999).

Bonnell then turned to the federal courts, seeking habeas relief under 28 U.S.C. §2254. He alleged “twenty general areas of alleged constitutional violation.” *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 718 (N.D. Ohio 2004). These purported errors included (in the District Court’s words) a variety of forms of “prosecutorial misconduct,” *id.* at 724–33, “judicial misconduct,” *id.* at 733–37, “instructional error,” *id.* at 737–56, “voir dire” errors, *id.* at 755–56, “ineffective assistance of counsel,” *id.* at 756–62, “appeal” errors, *id.* at 762–63, and two challenges to the “constitutionality of Ohio[s] death penalty statute,” *id.* at 763. The District Court denied Bonnell’s habeas petition. The Sixth Circuit unanimously affirmed, *see Bonnell v. Mitchell*, 212 F. App’x 517 (6th Cir. 2007), and this Court denied *certiorari*, *see Bonnell v. Ishee*, 552 U.S. 1064 (2007).

3. After another round of state-court proceedings raising issues not relevant here, Bonnell returned to federal court again, where he again sought habeas relief. Pet.App.6. This time, he argued that Ohio’s death-penalty scheme, at least as applied in his case, violates the Sixth Amendment rule announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016), which this Court decided years after most of Bonnell’s earlier state and federal cases. The District Court held that Bonnell’s habeas petition was second or successive and refused to hear the case. Pet.App.20.

The Sixth Circuit affirmed. It concluded that it could not entertain Bonnell’s petition, since 28 U.S.C. §2244(b)(2) says that “second or successive habeas corpus”

petitions that raise issues “not presented in a prior application shall be dismissed.” Section 2244(b)(2) contains an exception, under which courts may entertain second or successive petitions that raise “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” §2244(b)(2)(A). But the Sixth Circuit concluded that this exception did not apply to Bonnell’s case, since “the Supreme Court has not made *Hurst* retroactive to cases on collateral review.” Pet.App.2. It therefore refused to consider the issue.

After the Sixth Circuit denied *en banc* review, Pet.App.5, Bonnell timely filed a petition for *certiorari*, seeking review of the Sixth Circuit’s judgment. The Court denied Bonnell’s petition for a writ of *certiorari* on October 7, 2019. *See Bonnell v. Ohio*, 139 S. Ct. 2644 (2019).

4. Bonnell is back, seeking relief on precisely the same theory he raised in the Sixth Circuit. He claims that the Ohio Supreme Court made *Hurst* retroactive in “a unique act of state sovereignty.” Pet.8. And because the State made *Hurst* retroactive as a matter of *state* law, he claims, the federal courts can review Bonnell’s death sentence for compliance with *Hurst*.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for an original writ. Bonnell does not show the “exceptional circumstances” needed for the extraordinary relief he requests, Sup. Ct. R. 20.4(a), and he unnecessarily delayed in seeking relief.

I. Bonnell has not identified exceptional circumstances that would justify granting his original writ of habeas corpus.

While the Court has the power to grant an original writ of habeas corpus, 28 U.S.C. §2241(a), it uses that power sparingly, *see* Sup. Ct. R. 20.4(a). To justify such a writ, “the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.” *Id.* The relief is “rarely granted.” *Id.* Bonnell cannot make this demanding showing.

A. The Supreme Court of Ohio has not given *Hurst* retroactive effect.

To win habeas relief, Bonnell must show that the Ohio Supreme Court violated his federal constitutional rights. Bonnell claims the court did just that, by reweighing the aggravating and mitigating evidence, thereby violating *Hurst*. *See* Pet.26–28.

The problem is that this Court has never made *Hurst* retroactively applicable to cases, like Bonnell’s, on collateral review. To prevail, Bonnell would have to show (at least) that the Supreme Court of Ohio has given *Hurst* retroactive effect on its own. (The State assumes, for the sake of argument, that a state court’s giving a federal decision retroactive effect as a matter of *state* law creates a *federal* question that this Court has jurisdiction to review.) Bonnell claims that it has; that, acting “within its sovereign right,” the Supreme Court of Ohio has made *Hurst* retroactive as a matter of state law. Pet.17.

Bonnell is wrong. The Ohio Supreme Court has not given *Hurst* retroactive effect. *See State v. Belton*, 149 Ohio St.3d 165, 176 (2016). Instead, it has held that

Ohio law *complies* with *Hurst*, because it does not allow a judge “to make a factual finding during the sentencing phase that will expose a defendant to greater punishment.” *Id.* Because Ohio law complies with *Hurst*, the Supreme Court of Ohio has never had occasion to announce whether *Hurst* applies retroactively as a matter of state law. Bonnell’s contrary argument rests entirely on *State v. Kirkland*, 145 Ohio St.3d 1455 (2016). But that summary remand contains no analysis or discussion, and thus never addresses whether *Hurst* applies retroactively as a matter of state law. Indeed, it never addresses anything at all.

Because the Supreme Court of Ohio has never made *Hurst* retroactive as a matter of state law, the case does not even arguably apply to his sentencing.

B. Ohio’s capital-sentence system complies with *Hurst*.

Even if *Hurst* had retroactive effect in Ohio courts, Bonnell would *still* not be entitled to relief. Why not? Because Ohio’s capital-sentencing system comports with *Hurst*.

In *Hurst*, the Court invalidated Florida’s capital-sentencing system because it allowed a judge to increase the maximum punishment—from life imprisonment to a death sentence—“based on her own factfinding.” 136 S. Ct. at 620–22. That, the Court held, violated the Sixth Amendment right to a jury trial, under which “any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

Ohio’s approach is much different than Florida’s. For a defendant to be death-penalty eligible under Ohio law, the State must charge and prove an aggra-

vating circumstance at the guilt phase and the jury must find an aggravating circumstance beyond a reasonable doubt. *See* Ohio Rev. Code §2929.03 (addressing sentencing for aggravated murder); Ohio Rev. Code §2929.04(A) (listing aggravating circumstances). Then, at the mitigation phase, the jury must determine beyond a reasonable doubt that the aggravating circumstances outweigh any mitigating factors. Ohio Rev. Code §2929.03(D)(2). Only then, if the jury recommends death, does a court independently weigh mitigating factors against whatever aggravating circumstance the jury found. Ohio Rev. Code §2929.03(D)(3); *see also* Ohio Rev. Code §2929.05(A) (mandating, upon appeal, that the Ohio Supreme Court independently consider “whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case”). As a result, the court cannot impose a death sentence unless the jury first decides that a death sentence would be appropriate.

Ohio’s scheme does not violate *Hurst*. It tasks juries with finding every fact necessary to support a death sentence. In other words, it is impossible for a judge to increase a sentence based on judge-found facts. A judge’s only options are to (1) impose the jury’s recommended sentence or (2) impose a *lesser* sentence. *See* Ohio Rev. Code §2929.03(D)(1)–(3). The Ohio Supreme Court has already held, on multiple occasions, that Ohio’s capital-sentencing system complies with *Hurst*. *State v. Goff*, 154 Ohio St. 3d 218, 224–26 (2018); *State v. Mason*, 153 Ohio St. 3d 476 (2018); *State v. Belton*, 149 Ohio St. 3d 165, 176 (2016). This Court has denied review of the issue, also on multiple occasions. *Goff v. Ohio*, 139 S. Ct. 2715 (2019); *Mason v. Ohio*, 139 S. Ct. 456 (2018); *Belton v. Ohio*, 137 S. Ct. 2296 (2017).

Bonnell's sentence accords with all this. A jury recommended sentencing Bonnell to death after finding beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, *State v. Bonnell*, No. 55927, 1989 Ohio App. LEXIS 4982, at *25–26 (Ohio Ct. App. Oct. 5, 1989); the trial court accepted that recommendation, *Bonnell*, 61 Ohio St. 3d at 186–87; and the court of appeals and the Ohio Supreme Court independently reweighed the factors and determined “beyond a reasonable doubt” that the aggravating circumstances outweighed the mitigating circumstances, *id.*; accord *Bonnell*, 1989 Ohio App. LEXIS 4982 at *39–40.

Bonnell nonetheless claims that the application of Ohio's law to him violated *Hurst*. Bonnell's argument is hard to understand, but it seems to revolve around two alleged flaws in the trial-court proceedings. *First*, Bonnell says the trial court failed properly to instruct the jury that, under the relevant capital specification, the jury could recommend death only if it *expressly* found that Bonnell was either “the principal offender” or that Bonnell had “committed the aggravated murder with prior calculation and design.” Pet.6–7. The Ohio Supreme Court concluded that any error was harmless, since the evidence “in this case does not reasonably suggest that Bunner's murder was committed by more than one offender”—thus, Bonnell “was either the principal offender, or he committed no offense at all.” *Bonnell*, 61 Ohio St. 3d at 184. *Second*, the trial court sentenced Bonnell to death on two counts related to the same aggravated murder, Pet.7—an error that the Ohio Supreme Court concluded “was merely a procedural error which did not affect appellant's substantial rights.” *Bonnell*, 61 Ohio St. 3d at 183.

Neither of these errors implicates *Hurst*. *Hurst* prohibits courts from imposing the death penalty based on facts not found by a jury. *See* 136 S. Ct. at 622. With respect to the first error, the Ohio Supreme Court concluded that the jury *did* find Bonnell guilty of being the principal offender in an aggravated murder, thus establishing an aggravating factor beyond a reasonable doubt. *Bonnell*, 61 Ohio St. 3d at 184. Needless to say, the Ohio state courts could not have violated *Hurst* by doing exactly what it permits: affirming the death sentence based on an aggravating factor found by a jury beyond a reasonable doubt. As for the second alleged error, it has nothing to do with *Hurst*. Again, *Hurst* forbids judges from imposing a death sentence based on facts not found by a jury. The question whether the trial court failed to merge two counts relating to the same murder has no bearing on the factual findings undergirding the jury's death recommendation.

Finally, even if Bonnell could overcome all this, his petition presents a fact-bound dispute about the application of *Hurst* in very unusual circumstances. It is not worth the Court's time.

II. Bonnell is not entitled to an original writ of habeas corpus, because he unnecessarily delayed in seeking relief.

In addition to the lack of exceptional circumstances, the Court should deny this petition on the ground that Bonnell waited too long to file it.

"Habeas corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). Under well-established equitable principles, those who sleep on their rights are not entitled to

relief. See *Upton v. Tribilcock*, 91 U.S. 45, 55 (1875); *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005).

Bonnell slept on his rights. If he thought the state courts had run afoul of *Hurst*, he could have sought an original writ after this Court issued *Hurst* in January of 2016. At the very least, he could have filed his original petition at the same time as his *certiorari* petition, in May of 2019. Instead, he waited to file until December 2019—only about three months before his execution was scheduled to take place in February of 2020. (After Bonnell filed, the Governor moved Bonnell’s execution to March 18, 2021.) Bonnell’s delay is unjustifiable. Indeed, the delay is particularly inexcusable because this is a death-penalty case in which the execution date was quickly approaching. As this Court recently recognized, courts ought not encourage death-row inmates to use late-filed suits “as tools to interpose unjustified delay.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). Granting relief here would encourage future petitioners to follow Bonnell’s lead.

CONCLUSION

The Court should deny Bonnell's petition for a writ of habeas corpus.

Respectfully submitted,

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