

CAPITAL CASE

Case No. 19-6863

October Term, 2019

**IN THE
SUPREME COURT OF THE UNITED STATES**

IN RE MELVIN BONNELL, 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

INTRODUCTORY STATEMENT

Respondent is correct – the Ohio Death Penalty Statute and the federal constitution requires that a jury make those findings that rendered Petitioner death eligible. [Ohio’s scheme] tasks juries with finding every fact necessary to support a death sentence.” Brief in Opposition (“BIO”) at 10. Bonnell agrees with Respondent.

In Respondent’s carefully constructed statement of the procedural history, Respondent deftly avoided mentioning that the jury three decades ago **failed** to make the required finding on the sole eligibility factor. It has been approximately two-and-a-half decades since the State Supreme Court fixed an error in violation of the Constitution by substituting the jury’s required finding with its own.

Because Respondent agrees only juries may make certain findings, Respondent’s complaint that Petitioner is here again begs the real question. The real question is why it has taken so long for Ohio to afford the protections required by the Constitution. Why does Ohio refuse to afford Petitioner what it requires in every single other Ohio death penalty case?¹

¹ It should be noted that Respondent’s description of the trial testimony is irrelevant. The jury did not make the requisite findings when faced with the severely lacking case presented by the state.

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

Bonnell’s petition for writ of habeas corpus presents a question 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 violates the federal Constitution. If the Sixth Circuit’s decision barring review of Bonnell’s federal habeas petition under 28 U.S.C. § 2244 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. The ruling creates a certain class of claims – any federal constitutional claim to which a state gives broader retroactive effect than *Teague v. Lane*, 489 U.S. 288 (1989) requires – that cannot be reviewed by any federal court notwithstanding that the claim itself is based in federal law.

Indeed, even Respondent recognizes Bonnell’s “unusual circumstances.” BIO at 12. Those “unusual circumstances” demonstrate the exceptional importance of the questions presented herein.

Moreover, the Warden intimates then tries to avoid the equally significant issue presented – whether a state court’s voluntary retroactive application of federal constitutional law is a matter solely of *state* law, or creates a federal question. BIO at 8 (assuming *arguendo* that a state court’s retroactive application of federal constitutional law “as a matter of *state* law creates a *federal* question that this Court has jurisdiction to review”). However, the Warden’s concession does not reduce the significance of the issue presented or the necessity for definitive guidance from this

Court regarding, (1) whether the Sixth Circuit's interpretation of § 2244 puts this Court's holding in *Danforth* and a state's sovereign authority to apply new rules of federal constitutional law retroactively in conflict with federal courts' duty to provide an unified interpretation of federal constitutional law, and (2) whether a state's voluntary retroactive application of federal constitutional law transforms the matter of whether a petitioner's federal constitutional rights were violated into a state law issue. The second question is one of jurisdictional significance this Court must address because, if a state's voluntary retroactive application of federal constitutional law is strictly a matter of state law, that insulates the Ohio Supreme Court's decision in Bonnell's case, and other decisions like it, from federal review of any kind. That would include this Court's ability to review Bonnell's *Hurst* claim presented herein.

It is Bonnell's position that this Court has jurisdiction to review his claim. In clarifying the nature and scope of federalism where the 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 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, whether the right was 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 considered final. *Id.* at 288. This is within any state’s sovereign right to do. However, regarding the actual interpretation of federal constitutional law once a state has applied such law retroactively, this 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 a state’s retroactive application of federal constitutional law under *Danforth* transforms the issue into a matter of state law, or if review of the same is barred by § 2244, 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.² Whether *Danforth* creates a class of cases that fall outside of federal review, with Bonnell's being one such case, is a question of exceptional importance.

The Warden further tries to side-step this problematic scenario by claiming that the Ohio Supreme Court did not apply *Hurst v. Florida*, 136 S.Ct. 616 (2016), retroactively. BIO at 8. 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 Bonnell's substantively similar Rule 4.01 motion for *Hurst*-based relief.³

² For example, a petitioner could raise an identical *Hurst* claim to Bonnell'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 said case, Bonnell 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.

³ This touches upon this Court's distinction in *Danforth* between providing a remedy and considering the merits. The Ohio Supreme Court provided the remedy via its Rule 4.01 and addressed the merits. The state law question the Ohio Supreme Court decided was whether Rule 4.01 provided an available remedy. Answering that yes, the Ohio Supreme Court then went on and addressed the federal *Hurst* question. Indeed, this Court may take judicial notice of the Ohio Supreme Court's *Kirkland* docket wherein the State vigorously contested whether Rule 4.01 was an available remedy.

Specifically, this Court should take judicial notice of the Ohio Supreme Court's orders in *Kirkland*, which are available electronically.⁴ There, the Ohio Supreme Court granted Kirkland's Rule 4.01 Motion wherein he argued one issue: 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* Kirkland's direct appeal concluded. *Id.* The Ohio Supreme Court's actions occurred well after Kirkland's conviction became final. In granting Mr. Kirkland relief, the Ohio Supreme Court necessarily applied *Hurst* retroactively and therefore implicitly held that, in Ohio, *Hurst* is retroactive. Although the Ohio Supreme Court did not explicitly enunciate this holding, its retroactive application of *Hurst* to Kirkland's *Hurst* claim signifies its decision to retroactively apply it. This is not mere conjecture. The Ohio Supreme Court's retroactivity holding is clear because the sole claim raised by Mr. Kirkland was the violation of his Sixth Amendment rights under *Hurst*.⁵

The Warden cites *State v. Belton*, 74 N.E.2d 319 (Ohio 2016), for the proposition that the Ohio Supreme Court has not applied *Hurst* retroactively. BIO at 8. The *Belton* Court, which addressed a defendant's contention that *Hurst* entitled

⁴ See <https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2010/0854> (last visited on 08/12/2019).

⁵ 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).

him to jury sentencing notwithstanding that he waived his right to a jury trial, did not consider whether appellate reweighing violates *Hurst*. On the other hand, the constitutionality of appellate reweighing post-*Hurst* is the only issue raised by Kirkland, and subsequently by Bonnell, which the Ohio Supreme Court considered and ruled on in granting Kirkland (and denying Bonnell) relief. It is also noteworthy that in *Kirkland* the State raised a *Teague* retroactivity argument in its response as well as in a motion for reconsideration.⁶

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 Bonnell's assertion that the Ohio Supreme Court engaged in merits review of his *Hurst* claim and provided merits relief on Kirkland's substantively 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.

II. Bonnell is challenging Ohio's application of *Clemons*.

The Warden also spends significant time defending Ohio's death penalty scheme asserting that it is *Hurst* compliant. BIO at 9-12. These arguments are inapposite. Bonnell's *Hurst* claim asserts that the Ohio courts' practice of appellate

⁶ See *Kirkland*, Case No. 2010-0854, 5/12/2016, State's Motion for Reconsideration, pp. 4-5, http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=798594.pdf (last visited 08/12/2019).

reweighing to “cure” trial errors is unconstitutional, given *Hurst*. He does not challenge the constitutionality of Ohio’s death penalty scheme in general.

As the Warden concedes, 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. BIO at 10. Following *Hurst*, the Ohio appellate courts can no longer rely on *Clemons v. Mississippi*, 494 U.S. 738 (1990), to use reweighing to rectify the error in Bonnell’s case and others because the appellate court is substituting its judgment for that of the jury in a capital sentencing scheme wherein the weighing determination directly affects the defendant’s death-eligibility.

Specifically, in Bonnell’s case, two *Hurst* violations occurred. First, failing to merge multiple aggravating circumstances for a single homicide means that the jury was presented with two aggravating circumstances to weigh against Bonnell’s mitigation when there should only have been one. The Warden points out that the Ohio Supreme Court treated this as a procedural error. BIO at 11. However, as the dissenting Ohio Supreme Court Justice indicated during Bonnell’s direct appeal, the error affected Bonnell’s substantive right to a jury determination of every fact necessary to impose death because “we cannot say that the jury would not have considered, and been swayed by, the extra and improper aggravating circumstance when balanced against the single mitigating factor” presented by Bonnell. *State v. Bonnell*, 573 N.E.2d 1082 (Ohio 1991) (Brown, J., dissenting). Thus, Bonnell’s death

sentence rests not on a valid jury determination of his death eligibility, but on the Ohio Supreme Court's determination on appeal that aggravation still outweighed mitigation once the aggravating factors were properly merged.

Second, the jury never actually made a finding that Bonnell was either the principal offender or committed the aggravated murder with prior calculation and design, an element of the aggravating factor. The finding of the existence of this aggravating factor is an absolute prerequisite to Bonnell's death eligibility. The Warden and the appellate courts used the familiar refrain that the evidence in this case did not reasonably suggest anyone other than Bonnell was the principal offender; therefore, an express finding by the jury that Bonnell was either the principal offender or committed the murder with prior calculation and design was unnecessary. This cavalier attitude ignores the black letter fact that Bonnell is entitled to a finding, **by the jury** – not post hoc assumptions by the appellate court about what the jury necessarily “must have” concluded – and creates a slippery slope of reckless disregard for adherence to actual juror fact findings. The jury in Bonnell's case was never even charged with having to make the finding of whether Bonnell was the principal offender or committed the murder with prior calculation or design.

The reviewing courts in Bonnell's case could not sufficiently guarantee that inclusion of the extra aggravator did not persuade at least one of Bonnell's twelve jurors to vote for death over life. Nor could the reviewing courts discern with certainty what the jurors determined with regard to the uncharged aggravating factor, if they determined anything at all. With the jury's findings rendered unreliable, life in prison

was the maximum sentence Bonnell could receive under Ohio law absent a non-defective jury finding. *See* Ohio Rev. Code Ann. 2929.03(D)(2). Under *Hurst*, there was no valid jury fact finding in Bonnell's case because *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, and others, it was weighing aggravating circumstances and mitigating factors by the **reviewing court** that unconstitutionally and unreasonably determined death eligibility. In Bonnell's case, the reviewing court found the existence of the aggravating factor in the jury's stead.

III. Bonnell did not engage in unnecessary delay.

Bonnell does not face an immediate execution date. Bonnell never asked this Court for a stay of execution. Given that there is no immediate date, there presents no need or opportunity to consider the application of *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). There is no such controversy.

Further, it is well known of the problems in Ohio with its execution protocol. The current Governor has issued reprieves due to those problems over the past year. Perhaps this is why Respondent originally asked for an extension to file its BIO until the week before the then scheduled execution of Bonnell. Curiously, this Court's docket does not reflect the filing of the extension request.

Setting that aside, Respondent contends Bonnell slept on his rights because he should have filed an original action after this Court's *Hurst* opinion. BIO p. 13. This displays an extreme ignorance of federal habeas law and the doctrine of comity. While Respondent may not share this understanding, Bonnell understands federalism to

require exhaustion of available State remedies prior to proceeding to federal court. To Bonnell's knowledge, Respondent has never once since AEDPA's passage explicitly waived the exhaustion requirement. Thus, Respondent seeks to penalize Bonnell for complying with federalism principles. This is an absurdity.

Perhaps recognizing the underlying fallacy of this argument, Respondent asserts that Bonnell at minimum should have filed an original action with this Court in May 2019. BIO p. 13. Respondent cites no rule or precedent for this requirement – exactly because, and tellingly, there is none.

Bonnell is unaware of any time requirement under *Felker* for the filing of an original action with this Court. Indeed, and to the extent this Court were to apply such an onerous standard, there would seemingly be a problem of applying such a new default requirement upon Bonnell. *See Ford v. Georgia*, 498 U.S. 411 (1991). That should end the matter. Further, the procedural history of this case, if it demonstrates anything, demonstrates that Bonnell has vigorously pursued and is not shy in pursuing available remedies when they became apparent.

CONCLUSION

Based on the foregoing, this Court should grant Bonnell's petition for writ of habeas corpus to address the Sixth Circuit's erroneous application of § 2244, 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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