No. 20-5119

In The Supreme Court of the United States

WAYNE POWELL,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Evy M. Jarrett
Assistant Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43604
Phone No: (419) 213-2001
Ejarrett@co.lucas.oh.us

COUNSEL FOR RESPONDENT

CAPITAL CASE
(EXECUTION STAYED PENDING POSTCONVICTION PROCEEDINGS)

QUESTIONS PRESENTED

1. Ohio Criminal Rule 42 permits but does not require trial courts to fund expert witnesses to assist defendants in postconviction challenges to death sentences. Does the discretionary appointment of postconviction expert witnesses violate the due process rights of an individual sentenced to death?

2. In Ohio capital cases, a jury determines whether the defendant is guilty of the offense and capital specifications. If the jury finds the defendant guilty of the offense and specifications, the jury weighs the aggravating circumstances against the mitigating factors and makes a recommendation as to whether a death sentence should be imposed. The trial court may override the jury's decision and impose a life sentence instead of a death sentence, but the court cannot impose a death sentence if the jury has not made the requisite findings and recommendation of a death sentence. After a jury recommends imposition of a death sentence, is the court's finding that aggravating circumstances outweigh mitigating factors (or vice versa), a finding of fact to which the Sixth Amendment right to a jury trial attaches?

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INTRODUCTION

After a fight with his ex-girlfriend, Wayne Powell set fire to her house, causing her death and the deaths of her mother, her son, and another child. Another adult and three other children were also present but survived the fire. Powell was convicted of four counts of aggravated murder and a count of aggravated arson. *State v. Powell*, 971 N.E.2d 865, 874-879 (2012).

Powell's death sentences and convictions were affirmed in 2012, and he is currently pursuing state postconviction relief. He seeks the Court's review of two rulings, one related to the denial of expert witness funding to assist in post-conviction proceedings, and the other related to the denial of a motion for a new mitigation hearing based on the theory that Ohio's capital punishment statutes are unconstitutional.

Neither issue warrants further review. Powell's first claim amounts to an interlocutory appeal of a denial of expert funding to assist in postconviction proceedings. Because the trial court has not granted or denied the petition for postconviction relief (or even determined whether a hearing will be held), the appeal is not ideally positioned for this Court's review. Moreover, the issue is fact-specific and will offer little assistance to litigants in the future. Finally, nothing suggests that the trial court erred in denying the requested funds.

Before his trial, Powell received funding for various experts, including a mitigation investigator. He also received the benefit of an evaluation of a

psychologist, who testified at the mitigation phase of Powell's trial as to both general psychological matters as well as to substance abuse concerns. After the trial, but before sentencing, the trial court offered Powell an opportunity for a psychological examination and report to the court, but Powell declined the offer.

Powell sought postconviction relief with the assistance of multiple expert witnesses, and he submitted hundreds of pages of documents in support of his petition. But Powell also sought to retain a mitigation investigator, a substance abuse expert, a psychologist, and a neuropsychologist. In the context of the resources available to Powell before and after his trial, denial of his request for future expert funding did not demonstrate that Ohio's postconviction system was "fundamentally inadequate to vindicate the substantive rights provided," such that the procedures "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009).

Powell's second issue is the familiar and previously rejected argument that Ohio's death penalty statutes are unconstitutional pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016). According to Powell, Ohio's statutes violate the right to a trial by jury by permitting a trial court to override a jury's recommendation of a death sentence and to impose a sentence of life imprisonment instead.

Review of the second issue should be denied for several reasons. First, the Court has recently held that *Hurst* does not apply retroactively to cases, like Powell's, which were already final on direct review when *Hurst* was issued. *See*

McKinney v. Arizona, 140 S.Ct. 702 (2020). Second, the Court has denied certiorari in numerous cases contesting the constitutionality of Ohio's statutes pursuant to *Hurst.* Third, the Ohio statutory scheme is materially distinct from the schemes invalidated in other decisions issued by this Court, as recognized by other federal courts.

Petitioner offers no compelling reason to reverse the Ohio appellate court's decision affirming the trial court's denials of the motions in this case. Further review should be denied

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Ohio Crim. R. 42(E) states:

> (1) The trial court is the appropriate authority for the appointment of experts for indigent defendants in all capital cases and in post-conviction review of a capital case.
> (2) All decisions pertaining to the appointment of experts shall be made on the record at a pretrial conference. Upon request by defense counsel, the demand for the appointment of an expert shall be made in camera and ex parte, and the order concerning the appointment shall be under seal.
> (3) Upon establishing counsels' respective compliance with discovery obligations, the trial court shall decide the issue of appointment of experts, including projected expert fees, the amount of time to be applied to the case, and incremental fees as the case progresses. The trial court shall make written findings as to the basis of any denial.
> (4) The appeal of an order regarding appointment of experts shall be governed by App.R. 11.1.

Ohio Rev. Code 2929.03(D) provides

***(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the 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. ***

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, 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, or if the panel of three judges unanimously 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. ***

STATEMENT

On November 22, 2006, Wayne Powell was indicted on charges of one count of aggravated arson and ten counts of aggravated murder, each with multiple specific capital specifications. The charges arose out of an arson fire and the deaths of four victims, who were 3, 4, 33, and 52 years of age. *Powell, supra,* 971 N.E.2d at 874.

Before trial began, Powell received funding to retain the services of several experts:

- Fire investigator John Agosti ($1,000);
- Investigative Consultants ($2,500);
- Psychologist Wayne Graves ($2,500);

- Team Audio ($2,000); and
- The Ohio Public Defender's Office ($2,500).

Each order, entered May 21, 2007, specifically permitted defense counsel to petition the court "if further funds become necessary." (Pet.Appx. A-5, ¶3.)

The jury found Powell guilty of the count of aggravated arson, 10 counts of aggravated murder, and 26 separate capital specifications. Because four individuals lost their lives in the fire, the State elected to proceed with sentencing on one count of aggravated murder for each victim.

Before the sentencing phase began, the court advised Powell of his right to a presentence investigation and report prepared by the court, his right to a mental/psychological examination conducted by the court, and his right to make a statement, either sworn or unsworn. Powell declined to make a statement, and he also declined the opportunity for the court to order preparation of any presentence or mental/psychological examinations. (Pet.Appx. A-5, ¶5.)

The defense presented several witnesses in mitigation, including family members and Powell's juvenile probation officer. A psychologist, Dr. Wayne Graves, testified that Powell had average intellectual capacity and had obtained a G.E.D. (Tr. 2553-2554.) Graves testified that Powell abused drugs and alcohol and suffered a chronic depressive disorder, not otherwise specified, caused in part by the situation in which he was then finding himself. (Tr. 2556, 2586, 2582-2583.) He described Powell's daily use of alcohol and marijuana, as well as his use of crack cocaine. Graves also summarized the long history of drug and alcohol abuse in

Powell's family, including the fact that Powell's father gave him marijuana-laced brownies when he was 9 and beer when he was 10. *Powell, supra*, 971 N.E.2d at 905, ¶211.

The jury unanimously found that the penalty of death was the appropriate sentence for each separate aggravated murder conviction. (Pet.Appx. A-5, ¶5.) After receiving the jury's recommendation, the trial court found beyond reasonable doubt that the aggravating circumstances outweighed the mitigating factors. The court sentenced Powell to death for his conviction on the four aggravated murder counts and imposed a sentence of 10 years for his conviction of aggravated arson, with the sentences to be served consecutively. (Pet.Appx. A-6, ¶6.)

Petitioner filed a timely direct appeal, in which he raised 26 assignments of error, one of which involved his counsel's alleged ineffectiveness for failure to retain an expert in substance abuse. *See Powell, supra*, 971 N.E.2d at 905, ¶210-211. The Supreme Court of Ohio rejected those assignments of error and upheld Powell's convictions and sentences. (Pet.Appx. A-6, ¶7.)

While the merit appeal was pending, Powell filed a petition for postconviction relief, followed by a motion for funds to hire an expert witness in substance abuse. The petition was held in abeyance pending a decision in the merit appeal from the Supreme Court of Ohio. After the Court affirmed the convictions and sentence, the State filed a motion to dismiss/motion for summary judgment. That motion relied on factual support from the existing record of the case. The motion did not tender

any additional experts' opinions or reports. (Motion to Dismiss/Motion for Summary Judgment, June 14, 2012.)

Before the trial court decided the State's motion to dismiss, Powell sought and was granted leave to file an amended petition. That amended petition alleged 39 separate claims for relief, many of which focused on inadequacies in counsel's handling the mitigation and arson investigations. (Pet.Appx. A-6, ¶8.) The petition was supported by several reports and affidavits by expert witnesses, including:

- Affidavit of Investigator Mark Rooks with the Ohio Public Defender's Office (Exhibit 3);
- "Declaration" of Mark J.S. Heath, M.D. (Exhibit 16);
- Report authored by Steven W. Carman, MSc FPE, IAAI-CFL, ATF CFI (Retired), CFEI (Exhibit 40);
- Affidavit of Glen P. Jackson, Ph.D. (Exhibit 41);
- Affidavit of Laura L. Depas, CRNA, BSN, MS, LNC (Exhibit 82);
- Affidavit of John M. Agosti, Certified Fire and Arson Investigator (Exhibit 98); and
- Affidavit of Jennifer A. Prillo, J.D. (Exhibit A to Exhibit 100).

Despite the obvious resources employed to retain these expert witnesses and procure their affidavits and reports, and although the State had not offered any new expert testimony in its opposition to the petition, Powell also requested that the court order funds to hire a neuropsychologist, a psychologist, and a mitigation investigator, in addition to the substance abuse expert. (Pet.Appx. A-7, ¶10.) The State opposed the motion, reasoning that Ohio's postconviction statutes and rules of

procedure did not provide a right to expert assistance, and that Powell's substance abuse arguments had been addressed on direct appeal and were barred by res judicata. (Pet.Appx. A-7, ¶11.)

On August 16, 2018, the trial court denied Powell's motion for expert funds, stating that Ohio's postconviction statutes did not provide for expert funding as a matter of right, and offering as an additional basis for the denial the reasons cited in the State's opposition. (Pet.Appx. A-5, ¶15.)

Powell had also filed a motion for leave to file a motion for a new mitigation trial pursuant to Crim.R. 33 and *Hurst, supra,* 136 S.Ct. 616. On August 16, 2018, the trial court granted leave to file the motion for a new trial, but denied the motion on its merits. (Pet.Appx. A-8, ¶14.)

Powell appealed from both denials. On appeal, the State argued that the question of the expert witness funding was not a final and appealable order under Ohio's statutes defining appellate jurisdiction, but the State also argued the merits of both branches of the appeal. The Sixth Appellate District of Ohio affirmed, with an opinion dissenting in part on grounds that the expert funding order was not final and appealable. (Pet.Appx. A-4, A-33-37.) The majority held that the expert funding order was final, but that the trial court did not abuse its discretion in denying the funds. The court also rejected the constitutional challenge to the death penalty statutes, reasoning that "[t]he Supreme Court of Ohio . . . has explicitly—and repeatedly—found that Ohio's capital sentencing scheme is not unconstitutional under *Hurst.*" (Pet.Appx. A-27, ¶55 and 57; A-31, ¶64.)

Review of the lower courts' decisions is unnecessary in order to resolve or settle any issue of law, but even if an issue required clarification, Powell's case is a poor vehicle for doing so.

REASONS FOR DENYING THE WRIT

I. The discretionary denial of expert funding in postconviction proceedings is not an issue worthy of the Court's review.

A. Review should be denied in order to prevent piecemeal appellate review of an issue that may not be determinative of the proceeding.

Powell's postconviction proceeding has not yet been decided, so his appeal from the denial of expert funding is interlocutory. The interlocutory nature of the appeal may result in a piecemeal review of the postconviction proceeding and has already created additional delay in the lengthy postconviction process. And the appeal carries uncertainty as to whether the Court's decision will affect the outcome of the proceeding--after all, Powell's petition might ultimately be decided on a basis that has nothing whatsoever to do with expert witnesses. The Court should decline to expend its resources deciding a question which may turn out to have no effect on the outcome of the proceeding.

B. The issue is a factbound question which will not permit development of a new generally applicable legal principle.

Ohio Crim.R. 42 permits a trial court to grant requests to appoint experts in the postconviction review of capital cases. The rule permits an ex parte, in camera demand for experts, after which "the trial court shall decide the issue of the appointment of experts, including projected expert fees, the amount of time to be

applied to the case, and incremental fees as the case progresses." Ohio Crim.R. 42(E)(1), (2), and (3). The rule also provides for accelerated appellate review of the decision. Ohio Crim.R. 42(E)(4) and App.R. 11.1. Under Ohio law, decisions regarding expert appointments are reviewed for an abuse of discretion, which requires a demonstration that a decision was "contrary to law, unreasonable, not supported by the evidence or grossly unsound." (Pet.Appx. A-27, ¶48, 56.)

The trial court's discretionary evaluation of a request necessitates an analysis of the evidence sought and a comparison of the evidence already presented or available at trial. For example, in his direct appeal, Powell asserted that his trial counsel rendered ineffective assistance by failing to retain an expert in substance abuse matter. The Supreme Court of Ohio rejected the argument. *See Powell*, supra, 971 N.E.2d at 905, ¶210-211. Under Ohio law, issues related to substance abuse were clearly barred by res judicata from being relitigated in the postconviction phase of the case. *See, e.g., State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967). Denial of a request for a substance abuse expert was unsurprising and consistent with the appellate record.

But even if the issue had not been explicitly addressed on direct appeal, the trial court could properly deny the request based on Powell's previous work with a psychologist and a mitigation investigator. Any additional psychological report, whether from a substance abuse expert, a neuropsychologist or a forensic psychologist, would have been "cumulative of, or alternative to," the evidence already presented to the Court. *See, e.g., State v. Jackson*, 8th Dist. App. No.

104132, 2017-Ohio-2651, 2017 WL 1742715, ¶46 (May 4, 2017). Such evidence would be insufficient to warrant postconviction relief under Ohio law, even in a case in which death sentences have been imposed. *Id.*

In order to guard against a "never ending battle of experts," Ohio courts do not permit opinions of "newly found" mental health experts presented in postconviction settings to contradict findings of a mental health expert used at trial. *See, e.g., State v. Clemons*, 1st Dist. App. No. C-980456, 1999 WL 252655 (Aug. 30, 1999) (rejecting a postconviction claim based on the report of a newly found psychiatrist to challenge the trial testimony of a court-appointed psychological expert). *See also State v. Holloway*, 1st Dist. App. No. C-900805, 1992 WL 14347 (Jan. 29, 1992) (rejecting postconviction affidavits of three reviewing psychologists who discussed alleged inadequacies in the evaluations performed by court-appointed experts). Similarly, Ohio courts consider res judicata to bar newly proffered expert opinion which is based upon evidence in the trial record. *Id.; see also State v. Tenace*, 6th Dist. App. No. L-05-1041, 2006-Ohio-1226, ¶30 (March 17, 2006).

The discretionary allocation of funds for expert witnesses is a fact-bound issue of law, and one which must also account for the state law governing acceptable evidence in postconviction proceedings. The fact-specific nature of the issue prevents development of principles of law generally applicable to postconviction proceedings and weighs against further review by this Court.

C. A discretionary approach to requests for expert funding is not "fundamentally inadequate to vindicate Powell's substantive rights."

Powell argues that because Ohio has created a postconviction procedure, the appointment of postconviction experts must comport with due process principles. But Powell does not identify those principles in the context of postconviction proceedings.

This Court has previously held that a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). As a result, the State "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *Id.* at 69. To succeed in a due process challenge of postconviction procedures, Powell must show that the process is "fundamentally inadequate to vindicate the substantive rights provided," such that the procedures "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 69-71.

Powell has failed to carry the burden articulated in *Osborne*. He has offered no examples of other jurisdictions which require expert funding for postconviction proceedings, and he has not demonstrated that the discretionary grant or denial of expert funding is fundamentally inadequate to vindicate any substantive right. The trial court, as the court most familiar with the case, is in the best position to weigh the request in light of prior proceedings, and a trial court's determination that the

reports or opinions sought are barred by Ohio law is well within the proper exercise of the trial court's discretion.

D. Even if pre-trial due process requirements applied in this case, Powell's request for funding was properly rejected because he was not denied the "basic tools of an adequate defense."

Even if the pre-trial requirements of due process were applied to Powell's request for expert assistance, he cannot demonstrate a violation of due process rights. This Court has held that the denial of such a request rises to the level of a due process violation only when it denies the "basic tools of an adequate defense." *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). *See also Vore v. Bradshaw*, 6th Cir. No. 15-3085, 2015 U.S. App. LEXIS 15554, at *4 (Aug. 27, 2015) (trial court did not deny "basic tools of an adequate defense" in refusing to fund an eyewitness identification expert). *Ake* recognized that an indigent defendant has a due process right to access to psychiatric examinations and expert assistance necessary to mount a defense based on mental condition when the defendant's sanity at the time of the offense is seriously in question. *Id.*, at 70. But Ake explicitly rejected the notion that "the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83.

Ake cannot be interpreted to require the appointment of experts in Powell's postconviction proceeding. Unlike Ake, Powell did not seek assistance in developing a pretrial insanity claim. And unlike Ake, Powell was not denied expert assistance in his mitigation investigation or in his presentation of issues related to his

psychological or substance abuse concerns. Moreover, the State's motion in response to the petition did not rely on expert opinions or reports which had not been presented at trial, so Powell was not denied the opportunity of "offering contrary evidence or . . . explaining the inadequacies" of the State's response. *See Ford v. Wainwright*, 477 U.S. 399,424 (1986) (Powell, J., concurring).

Application of *Ake* in this case would represent a significant broadening of the right to expert assistance for the advancement of claims asserted in postconviction proceedings. Such a broadening is unwarranted, because Powell's motion amounted to a suggestion of "a mere possibility of assistance from a requested expert" without demonstrating that the denial of that assistance amounted to a "fundamentally unfair" postconviction proceeding. *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993). *Accord Moore v. Kemp*, 809 F.2d 702, 711 (11th Cir. 1987); and *Pruett v. Choate*, 711 F.App'x 203, 207 (5th Cir. 2017).

Powell was not deprived of the services of experts or investigators, either before his trial or in his postconviction efforts. Given the extensive investigation conducted before trial and the hundreds of pages of documents provided to the court in support of his petition and amended petition for postconviction relief, the trial court's denial of additional expert funds cannot be said to have deprived Powell of the basic tools required for his postconviction proceeding. The standards and principles applicable to his request for expert funding require no expansion or clarification by this Court.

II. Certiorari should be denied on the issue of the constitutionality of Ohio's death penalty statutes.

A. Powell's case is before the Court on review of state postconviction proceedings, a collateral review process, so that *Hurst* does not apply.

Powell's convictions and sentences were affirmed on direct appeal on June 3, 2012. *Hurst* was decided in 2016, more than four years later. On February 25, 2020, this Court held that *Hurst* does not apply retroactively to cases which come before it on state collateral review. *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020). Further review of this matter would be inconsistent with the holding in *McKinney*.

B. This Court has previously denied certiorari cases raising the same issue.

The Supreme Court of Ohio has upheld Ohio's death penalty statutes against challenges based on *Hurst* and related cases, and this Court has denied certiorari in those cases. *See State v. Belton*, 74 N.E.3d 319, 337, ¶60-61 (Ohio 2016), certiorari denied by *Belton v. Ohio*, 137 S.Ct. 2296 (2017); *State v. Goff*, 113 N.E.3d 490, 497, ¶35-36 (Ohio 2018), certiorari denied by *Goff v. Ohio*, 139 S.Ct. 2715 (2019); *State v. Mason*,108 N.E.3d 56, 63-68, ¶23-42 (Ohio 2018), certiorari denied by *Mason v. Ohio*, 139 S.Ct. 456 (2018); *State v. Tench*, 123 N.E.3d 955, 1005 (Ohio 2018), ¶279, certiorari denied by *Tench v. Ohio*, 140 S.Ct. 206 (2019); and *State v. Ford*, 140 N.E.3d 616, 709, ¶441 (2019 Ohio), certiorari denied by *Ohio v. Ford*, 207 L.Ed.2d 1073 (2020).

C. Petitioner has not demonstrated a conflict between the Ohio Court of Appeals decision and a decision of another state court of last resort or a United States Court Of Appeals.

Decisions from federal courts have also rejected *Hurst*-based challenges to Ohio's death penalty statutes, consistent with the Court of Appeals' decision in this case. *See, e.g., Dunlap v. Paskett*, S.D.Ohio No. 1:99-cv-559, 2019 WL 1274862 (Mar. 20, 2019); *Gapen v. Bobby*, No. 3:08-cv-280, 2017 WL 561493 (S.D. Ohio Feb. 17, 2017); and *Smith v. Pineda*, No. 1:12-cv-196, 2017 WL 631410 (S.D. Ohio Feb. 16, 2017). Powell has not demonstrated any meaningful conflict in courts' analyses of the issue. The uniformity of authority rejecting *Hurst*-based challenges to the Ohio statutory scheme does not warrant further clarification by this Court.

D. The lower courts properly rejected constitutional challenge because Ohio's statutes are materially distinct from those invalidated by *Hurst*.

Petitioner has failed to identify a single decision that invalidated Ohio's statutes--or any similar procedure existing in any other state--based on *Hurst* or the Court's prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or *Ring v. Arizona*, 536 U.S. 584 (2002).

The first of those decisions, *Apprendi*, did not involve a capital punishment scheme, and nothing in the opinion suggested it could be interpreted to invalidate statutes comparable to Ohio's. *Apprendi* held that a defendant "has an absolute entitlement to jury trial on all the elements of the charge," but recognized that within the acceptable range of punishments, "it may be left to the judge to decide

whether that maximum penalty, rather than a lesser one, ought to be imposed." *Apprendi*, 530 U.S. at 497, quoting with approval *Almendarez-Torres v. United States*, 523 U.S. 224, 257 (1998), n. 2 (Scalia, J., dissenting).

Apprendi cannot be construed to invalidate Ohio's statutory scheme, which respects the right to a jury determination of the elements of the offense and the capital specifications. And once the jury determines that the defendant is eligible for capital punishment, that punishment is within the acceptable range of punishments that the court may choose to impose.

Ring and *Hurst* both involved capital punishment statutes, but the statutes involved in those cases were not comparable to Ohio's statutes. *Ring* examined Arizona's statutory scheme, which permitted a jury adjudication of guilt of first degree murder, but which required the court to find the presence of aggravating circumstances required for imposition of a death sentence. *See Ring*, 536 U.S. at 588-89. The Court held that Arizona's statutes were unconstitutional because the "aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" so that the defendant had a right to have those factors submitted to the jury for its determination. *Id.* at 609. *Ring* thus established that a defendant who exercised his right to a jury trial of a capital offense was also entitled to a jury determination of the aggravating circumstances necessary to impose the sentence of death.

The statutory scheme at issue in *Ring* stands in sharp contrast to Ohio's law. Arizona's first phase of capital trials did not involve a determination of the aggravating circumstances making defendants eligible for the death penalty. *Ring*, 536 U.S. at 592. In Ohio, on the other hand, a capital sentence may only be imposed when a defendant is indicted with aggravated murder in violation of Ohio Rev. Code 2903.01 and one or more capital specifications listed in Ohio Rev. Code 2929.04. Additionally, Ohio law requires that the jury verdict form specifically state whether the defendant is found guilty of each specification charged. *See* Ohio Rev. Code 2929.03(B).

The jury's findings on the capital specifications occur before the mitigation phase of the trial, and death cannot be imposed as punishment in the absence of findings with respect to both the crime and the specification. In fact, a defendant may not offer evidence in mitigation until after these findings are made. See Ohio Rev. Code 2929.03(D). *See also Belton, supra*, ¶59 (under Ohio law, "a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances").

The differences in Arizona's former scheme and Ohio's statutes are material. As the Ohio Supreme Court has recognized, "*Ring* has no possible relevance" to Ohio's death penalty statutes. *State v. Hoffner*, 811 N.E.2d 48, 59 (Ohio 2004), ¶69. While Arizona statutes gave the trial court the sole responsibility for making the factual determinations necessary for a death sentence, "Ohio's capital-sentencing

scheme places that responsibility with the jury." *Id.* Accordingly, *Ring* may not be interpreted to invalidate Ohio's statutory scheme.

Hurst, the most recent of the three cases, is equally inapplicable to Ohio's laws. *Hurst* involved Florida's statutory scheme providing that the maximum sentence for a first-degree murder conviction alone was life imprisonment, but first degree murder could be punishable by death if an additional sentencing proceeding "result[ed] in findings by the court that such person shall be punished by death." *Hurst*, 136 S.Ct. at 620. The additional proceeding was a "hybrid" evidentiary hearing followed by an "advisory verdict" by the jury without any factual findings. But "[n]otwithstanding the recommendation of a majority of the jury," the trial court could "enter a sentence of life imprisonment or death." *Id.* In other words, the trial court could override the jury's recommendation of life imprisonment and impose a death sentence, so that "a judge **increased** Hurst's authorized punishment based on her own factfinding." *Id.*, at 622 (emphasis added). In contrast, while Ohio law permits the trial court to override the jury's recommendation, the court may do so only by imposing the less severe punishment of life imprisonment after engaging in a sentencing evaluation of the mitigation evidence.

E. Even cases that view the mitigation phase as a factfinding process ultimately recognize the material distinction between Ohio and Florida's statutory schemes.

Petitioner's argument assumes that the weighing of mitigating factors and aggravating circumstances is a factual finding within the scope of *Apprendi*, *Ring*, and *Hurst*. His assumption is unfounded, because the weighing process "cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *Belton, supra*, ¶60, quoting *State v. Gales*, 658 N.W.2d 604, 628 (Neb. 2003). Instead, the weighing process is "'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible." *Belton*,¶60, quoting *United States v. Runyon*, 707 F.3d 475, 515-516 (4th Cir. 2013). *See also Mason, supra*, 108 N.E.3d at 64-65, ¶26-29.

The Sixth Circuit has also concluded that *Apprendi* "does not apply to every 'determination' that increases a defendant's maximum sentence." *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013). Rather, *Apprendi* "applies only to findings of 'fact' that have that effect." Factual findings such as whether "the defendant acted with a particular state of mind, or possessed a particular quantity of drugs, or was himself the triggerman," are "binary," requiring a determination of "whether a particular fact existed or not." *Id.* In contrast, the decision to impose the death penalty requires consideration of whether one type of factor sufficiently outweighs another and justifies a particular sentence. The process is a moral or value judgment "of assigning weights to competing interests, and then determining,

based upon some criterion, which of those interests predominates." *Gabrion, supra,* at 532.

The State acknowledges that after *Hurst*, the United States District Court for the Southern District of Ohio considered the process of weighing aggravating circumstances and mitigating factors to be "a question of fact akin to an element under the *Apprendi* line of cases, that is, a fact necessary to be found before a particular punishment can be imposed." *Gapen v. Bobby*, S.D. Ohio No. 3:08-cv-280, 2017 WL 661493 (Feb. 17, 2017). *See also McKnight v. Bobby*, S.D. Ohio No. 2:09-cv-059, 2017 U.S. Dist. LEXIS 45663 (Mar. 27, 2017) (recognizing "the *Hurst* element, to wit, that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt"); and *Mason, supra,* 108 N.E.3d at 64, ¶27 (collecting cases).

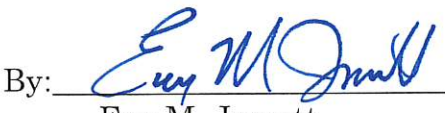
This interpretation of *Hurst* does not require resolution by the Court. *Gapen* quite sensibly went on to hold that the court's reweighing was "on top of the jury's weighing" and provides extra protection beyond that required by the Constitution, much as a judge may enter an acquittal notwithstanding a jury's verdict if the court determines the evidence was insufficient to support the verdict. *Id. McKnight* similarly recognized the significance of judicial discretion in sentencing and noted that application of *Hurst* to the sentencing phase of a capital case "would imply that jury sentencing would be constitutionally compelled, and not just in capital cases." *McKnight, supra,* 2017 U.S. Dist. LEXIS 45663, at *5-7.

Simply put, Ohio has granted defendants the added protection of permitting the court to override a jury's finding that a death sentence should be imposed. The Court should reject the attempt to invalidate the statutes based solely on the fact that the jury renders a non-binding determination, because that determination is the factual finding on which the trial court's consideration of the death penalty is conditioned.

CONCLUSION

The Court should deny Powell's petition for writ of certiorari.

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 

Evy M. Jarrett
Assistant Prosecuting Attorney