No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

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v.

STATE OF OHIO,

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On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX A TO WRIT OF CERTIORARI
State v. Jalowiec, 159 N.E.3d 1157 (Table) (Ohio 2020)
(Ohio Supreme Court Declines Jurisdiction)

The Supreme Court of Ohio

State of Ohio

v.

Stanley Jalowiec

Case No. 2020-1213

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Lorain County Court of Appeals; No. 19CA011548)

Maureen O'Connor
Chief Justice

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX B TO WRIT OF CERTIORARI
State v. Jalowiec, 9th Dist. Lorain 19CA011548,
2020-Ohio-4177, 2020 WL 4933561
(Intermediate Appellate Court Denies Relief)

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

STANLEY JALOWIEC

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 95CR046840

DECISION AND JOURNAL ENTRY

Dated: August 24, 2020

SCHAFER, Judge.

{¶1} Defendant-Appellant, Stanley Jalowiec, appeals the judgment entry of the Lorain County Court of Common Pleas denying his motion for a new mitigation trial. In light of the following, this Court affirms.

I.

{¶2} In 1996, Jalowiec was convicted of aggravated murder and sentenced to death. We previously summarized the lengthy and complex history of this case in *State v. Jalowiec*, 9th Dist. Lorain No. 17CA011166, 2019-Ohio-2059, ¶ 2-3:

> [T]he facts [underlying this case] have been previously set out in *State v. Jalowiec*, 9th Dist. Lorain No. 14CA010548, 2015-Ohio-5042, ¶ 7-18 and *State v. Jalowiec*, 91 Ohio St.3d 220, 220-224 (2001). The Supreme Court of Ohio affirmed Jalowiec's conviction and sentence of death. *Jalowiec*, 91 Ohio St.3d at 240. The appellate history also includes: *State v. Jalowiec*, 9th Dist. Lorain No. 96CA006445, 1998 WL 178554 (Apr. 15, 1998) [hereinafter "*Jalowiec Direct Appeal*"] (direct appeal; affirming conviction); *State v. Jalowiec*, 9th Dist. Lorain Nos. 01CA007844, 01CA007847, 2002 WL 358637 (Mar. 6, 2002) (appeal of dismissal of motion for postconviction relief and three subsequent amended motions for postconviction relief), appeal not accepted, 96 Ohio St.3d 1439, 2002-

Ohio-3344; *Jalowiec v. Bradshaw*, N.D.Ohio No. 1:03 CV 0645, 2008 WL 312655 (Jan. 31, 2008) (denial of petition for writ of habeas corpus); *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir.2011) (affirming denial of writ of habeas corpus); *Jalowiec*, 2015-Ohio-5042 (affirming denial of motion for new trial), appeal not accepted, 149 Ohio St.3d 1405, 2017-Ohio-2822.

In January 2017, Jalowiec filed a motion for leave to file a motion for a new mitigation trial pursuant to Crim.R. 33 and *Hurst v. Florida*, 136 S.Ct. 616 (2016). Attached to the motion was Jalowiec's proposed motion for a new mitigation trial. The State responded in opposition. The trial court ultimately denied the motion for leave to file the motion for a new mitigation trial.

{¶3} In his most recent prior appeal to this Court, Jalowiec argued that the trial court erred when it denied his motion for leave to file a motion for a new trial. This Court determined that the trial court had not ruled on Jalowiec's motion for leave. Instead, the trial court partially considered the merits of the motion for a new trial itself by denying the motion with respect to Jalowiec's argument that Ohio's death penalty sentencing scheme is unconstitutional pursuant to *Hurst*, but disregarding Jalowiec's alternative argument that Ohio's death penalty statute was unconstitutional as applied in this case.

{¶4} Upon remand, the trial court granted Jalowiec's motion for leave to file a motion for a new trial. Considering the merits of the motion, the trial court rejected Jalowiec's argument that Ohio's death-penalty scheme is unconstitutional in light of *Hurst*. The trial court also rejected Jalowiec's argument that *Hurst* provided a basis for asserting that Ohio's scheme is unconstitutional as applied in his case, and ruled that the argument was barred by the doctrine of res judicata.

{¶5} Jalowiec appealed the trial court's denial of his motion for a new trial and raised two assignments of error for our review. To facilitate our analysis, we consider his assignments of error in reverse sequence.

II.

Assignment of Error II

The trial court erred by denying Jalowiec's motion for a new mitigation trial because Ohio's death penalty scheme is unconstitutional based on *Hurst*.

{¶6} In his second assignment of error, Jalowiec argues that the trial court erred when it denied his motion for a new mitigation trial. Citing to the United States Supreme Court's decision in *Hurst*, 136 S.Ct. at 616, Jalowiec contends that he was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution. Although Jalowiec raised this issue to the trial court in a motion for a new trial pursuant to Crim.R. 33(1), (4), and (5), his argument on appeal focuses only on his claim that *Hurst* invalidates Ohio's capital sentencing scheme.

{¶7} Crim.R. 33 permits a defendant to move for a new trial when his substantial rights have been materially affected. The rule enumerates several grounds upon which a defendant may seek a new trial including, in pertinent part:

> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
>
> * * *
>
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
>
> (5) Error of law occurring at the trial[.]

Crim.R. 33(A). Generally, a trial court's decision to grant or deny the underlying motion for a new trial is reviewed for an abuse of discretion. *State v. Gilliam*, 9th Dist. Lorain No.

14CA010558, 2014-Ohio-5476, ¶ 8, citing *State v. Jones*, 9th Dist. Summit No. 26568, 2013-Ohio-2986, ¶ 8. An abuse of discretion implies the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶8} As the basis for his motion for a new mitigation trial, Jalowiec cites to the United States Supreme Court's decision in *Hurst*, holding that "[t]he 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. In addressing the merits of Jalowiec's motion, the trial court considered the decisions of several Ohio courts holding that *Hurst* does not apply to Ohio's capital sentencing scheme, and concluded that the Supreme Court of Ohio's decision to that effect in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, is controlling. The trial court rejected Jalowiec's argument because Ohio's death penalty scheme differs from the Florida death penalty statute held unconstitutional in *Hurst*, and because Ohio's death penalty scheme "is not unconstitutional based upon the United States Supreme Court's ruling in *Hurst*." (Emphasis original.) In denying Jalowiec's motion for a new trial on these grounds, the trial court also noted that every Ohio court having "addressed a *Hurst* challenge to the constitutionality of Ohio's death penalty statutes has found the argument unpersuasive."

{¶9} In his merit brief, Jalowiec does not argue that the trial court abused its discretion in any manner specifically related to Crim.R. 33. Instead he contends that the trial court, in addition to the Supreme Court of Ohio, erred in interpreting *Hurst*. "When the question presented on appeal is strictly one of law, this Court applies a de novo standard of review." *State v. Prade*, 9th Dist. Summit No. 28193, 2018-Ohio-3551, ¶ 7. "A de novo review requires an independent review of the trial court's decision without any deference to [its] determination." *State v. Consilio*, 9th Dist. Summit No. 22761, 2006-Ohio-649, ¶ 4.

{¶10} In *Hurst*, the United States Supreme Court considered the constitutionality of Florida's capital sentencing statute and invalidated the statute because it limited the jury's role in sentencing to an advisory recommendation and did "not require the jury to make the critical findings necessary to impose the death penalty." *Hurst*, 136 S.Ct. at 622. The Supreme Court of Ohio has twice reviewed the *Hurst* decision as it relates to Ohio's capital sentencing scheme. On both occasions the Court determined that the basis upon which the *Hurst* Court found Florida's statute to be unconstitutional is not present in Ohio's statute. *Belton*, 2016-Ohio-1581; *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462.

{¶11} Rejecting a challenge to the constitutionality of Ohio's capital sentencing scheme, the Supreme Court of Ohio observed that, unlike the Florida statute at issue in *Hurst*, "[i]n Ohio, 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." *Belton* at ¶ 59. An Ohio "judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence." *Id.* The Court again considered the constitutionality of Ohio's death-penalty scheme under the holding of *Hurst* in *Mason*. In *Mason*, the Court found that, although "Ohio trial judges may weigh aggravating circumstances against mitigating factors and impose a death sentence[,]" they may do so "only after the jury itself has made the critical findings and recommended that sentence." *Mason* at ¶ 42. Accordingly, *Mason* held Ohio's statute does not violate the right to a trial by jury as guaranteed by the Sixth Amendment to the United States Constitution. *Id.*

{¶12} Jalowiec has not demonstrated error in the trial court's interpretation of the holding in *Hurst* nor in its application of the Supreme Court of Ohio's holdings in *Belton* and *Mason* as binding authority. Moreover, this Court is bound by the decisions in *Belton* and *Mason* that expressly reject the argument Jalowiec asks us to accept in support of his claim that he is entitled

to a new mitigation trial. Consequently, Jalowiec's argument regarding the applicability of *Hurst* to invalidate Ohio's death penalty fails as a matter of law. Thus, we conclude *Hurst* has no bearing on the mitigation phase of Jalowiec's trial, and the trial court did not err by denying his motion for a new trial.

{¶13} Jalowiec's second assignment of error is overruled.

Assignment of Error I

The trial court erred when it denied Jalowiec's motion for a new mitigation trial because Jalowiec proved Ohio's death penalty statute is unconstitutional as applied to his case. [ ].

{¶14} In his first assignment of error, Jalowiec asserts that, after *Hurst*, it is unconstitutional to tell a jury that its sentencing verdict is only a recommendation. Jalowiec contends "*Hurst* teaches that advisory jury verdicts are insufficient to support a death sentence."

{¶15} Generally, we review a trial court's denial of a motion for a new trial for an abuse of discretion. *Gilliam*, 2014-Ohio-5476 at ¶ 8, citing *Jones*, 2013-Ohio-2986 at ¶ 8. However, Jalowiec contends that the trial court erred in its interpretation of law by finding that *Hurst* did not apply to the circumstances of his case and further erred in concluding that the argument he raised in his Crim.R. 33 motion for a new trial was barred by res judicata. Accordingly, this Court will apply a de novo standard of review to the issues Jalowiec raises strictly as a question of law. *Prade*, 2018-Ohio-3551 at ¶ 7.

{¶16} This is not the first time Jalowiec has argued to this Court that the trial court erred by telling the jury that its sentencing decision was only a recommendation. In his direct appeal, Jalowiec argued in his twelfth assignment of error "that the trial court erred by referring to the jury's decision in the penalty phase of the trial as a 'recommendation' during voir dire of the potential jurors, the guilt phase of the trial, the penalty phase, and in the court's instructions to the

jury during the penalty phase." *Jalowiec Direct Appeal*, 1998 WL 178554 at *13. This Court noted that, "[i]n its instructions to the jury, the trial court told the jury:"

> * * * It is going to be your responsibility at this point to decide which sentence to recommend to the Court regarding the alternative charges of Aggravated Murder with the specification.
>
> I have used the word recommend many times and the attorneys have used it, and I want to make sure that you understand that you are not to construe that word to diminish your responsibility in this matter. It is an awesome task, and the fact thadt [*sic*] the word recommend is used should not be considered by you to lessen your task.

Id. This Court recognized that Jalowiec failed to object to the trial court's penalty phase jury instructions below and had waived all but plain error with regard to the issue. *Id.* at *11. Consequently, this Court overruled Jalowiec's assignment of error, holding that "'[t]he term "recommendation" accurately reflects Ohio law and does not diminish the jury's sense of responsibility. There is no error, plain or otherwise.'" *Id.* at *13, quoting *State v. Moore*, 81 Ohio St.3d 22, 37 (1998).

{¶17} Jalowiec raised the argument again in his most recent motion for a new trial under the pretense of the holding in *Hurst* having some bearing on the issue. Initially, in its order overruling Jalowiec's motion for a new trial, the trial court found that Jalowiec's argument was barred by the doctrine of res judicata because his argument had been overruled in his direct appeal. Next, the trial court concluded Jalowiec's argument lacked merit because "there is nothing in the *Hurst* * * * decision[] that suggest[s] that it is constitutionally problematic to inform potential jurors that the decision to impose death is a 'recommendation' to the court." The trial court stated that the Supreme Court of Ohio "has repeatedly held that references by the court or attorneys to death penalty "recommendations" is not constitutionally cognizable[,]" and concluded that the law on this point is the same today as it was at the time Jalowiec was tried and convicted.

{¶18} In his merit brief, Jalowiec contends the "unique circumstances of [his] case make his death sentence unconstitutional after *Hurst*." As we indicated in the previous assignment of error, the Supreme Court of Ohio has already determined that *Hurst* does not apply to Ohio's capital sentencing scheme. *Belton*, 2016-Ohio-1581 at ¶ 58-59; *Mason*, 2018-Ohio-1462 at ¶ 19-21. Still, in support of his argument, Jalowiec cites to the holding in *Hurst*: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 136 S.Ct. at 619. Focusing on the "mere recommendation" phrase, Jalowiec argues the holding of *Hurst* is implicated by the fact that the jury in his case "[f]rom voir dire to jury deliberations" was repeatedly told that their sentencing verdict was a recommendation, and the trial judge would "ultimately decide what sentence to impose."

{¶19} As it pertains to the process in Ohio, and the circumstances of his particular case, Jalowiec misconstrues the statement in *Hurst* that a "jury's mere recommendation is not enough[,]" *Hurst* at 619, and asks this Court to consider it out of context. In *Hurst*, the United States Supreme Court deemed the Florida statute under review unconstitutional because it "required the jury to render an 'advisory sentence' after hearing the evidence in a sentencing-phase proceeding[.]" *Mason* at ¶ 31. Specifically, the United States Supreme Court held that the Florida scheme violated "violated the Sixth Amendment because it did not require the jury to find that [a defendant] was guilty of committing a specific aggravating circumstance." *Id.* However, *Hurst* did not create a requirement under the Sixth Amendment that the jury alone must decide whether a sentence of death will be imposed.

{¶20} *Hurst* did not touch on the issue Jalowiec has raised here: whether it is constitutionally problematic to inform a jury that their decision regarding sentencing is a

recommendation. In contrast to the Florida statute, Ohio "requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence." *Id.* at ¶ 32. *Hurst* simply made clear that the Sixth Amendment requires that a jury must make the specific and critical finding that the defendant is eligible for the death penalty *before the jury can recommend* that the defendant be sentenced to death. *See id.* at ¶ 32. After the jury makes its sentencing recommendation, Ohio judges are then required to find, independent of the jury's recommendation, whether a death sentence should be imposed. This step operates as a "safeguard" because a judge cannot find additional aggravating circumstances or increase the sentence beyond the jury's recommendation. *Id.* at ¶ 40. The authority of Ohio trial judges to weigh aggravating circumstances with mitigating factors is derived "wholly from the jury's verdict" and, therefore, Ohio's process is appropriate within the framework of the Sixth Amendment. *Mason* at ¶ 42. Nothing in our reading of *Hurst* supports Jalowiec's argument that it declared it unconstitutional to inform the jury that their sentencing decision was a recommendation. Thus, we conclude, *Hurst* had no bearing on Jalowiec's "as-applied" argument in his motion for a new trial.

{¶21} Because *Hurst* breathes no new life into the issue of the constitutionality of informing an Ohio jury that its decision as to whether a defendant should be sentenced to death is a recommendation, Jalowiec has not identified a meritorious basis to revisit this issue. Absent *Hurst*—the sole alleged basis for Jalowiec's motion for new trial—the underlying issue was already decided on direct appeal. *Jalowiec Direct Appeal*, at *13. Therefore, we conclude that the trial court did not abuse its discretion by concluding that *Hurst* did not apply to Jalowiec's as-applied argument, nor did the court err by concluding that the argument was barred by res judicata.

{¶22} Jalowiec's first assignment of error is overruled.

III.

{¶23} Jalowiec's first and second assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Julie A. Schafer

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

RICHARD A. CLINE, Senior Assistant Public Defender, and MICHELLE UMANA, Assistant Public Defender, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX C TO WRIT OF CERTIORARI
State v. Jalowiec, Lorain County Common Pleas Court
Case No. 95CR046840, July 26, 2019 Judgment Entry
(Trial Court Denies Relief After Remand)

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date July 26, 2019 Case No. 95CR046840

STATE OF OHIO
Plaintiff

A. Cillo, L. Dezort, M. Kern
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

This matter is before the Court on remand from the Ninth District Court of Appeals (Case No. 17CA011166), in an opinion filed May 28, 2019 and Defendant/Petitioner, Stanley Jalowiec's ("Jalowiec"), Motion For Telephone Status Conference, filed July 22, 2019.

Given this Court's disposition of the remand order *infra,* the Motion For Telephone Status Conference is DENIED as moot.

Jalowiec's Motion For Leave To File A Motion For A New Mitigation Trial is well-taken and hereby GRANTED.

Jalowiec's Motion For A New Mitigation Trial is not well-taken and hereby DENIED.

See Judgment Entry.

IT IS SO ORDERED. No Record.

JUDGE D. CHRIS COOK

cc: A. Cillo, Asst. Cty. Pros.
L. Dezort, Asst. Cty. Pros.
M. Kern, Asst. Cty. Pros.
R. Cline, Esq.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date July 26, 2019 Case No. 95CR046840

STATE OF OHIO
Plaintiff

A. Cillo, L. Dezort, M. Kern
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

I. INTRODUCTION

This matter is before the Court on remand from the Ninth District Court of Appeals (Case No. 17CA011166), in an opinion filed May 28, 2019 and Defendant/Petitioner, Stanley Jalowiec's ("Jalowiec"), Motion For Telephone Status Conference, filed July 22, 2019.

II. PRELIMINARY STATEMENT

The gravamen of the remand order is that this Court ". . . explicitly disregarded the requirements of Crim. R. 33(B) and instead, partially considered the merits of Jalowiec's attached motion for a new mitigation trial."[1]

The relevant portion of Crim. R. 33(B) reads as follows,

> Application for a new trial shall be made by motion which . . . shall be filed within fourteen days after the verdict was rendered . . . unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

The Ninth District's remand order is accurate to the extent that this Court did not explicitly determine whether leave should be granted or denied and instead,

[1] *State v. Jalowiec*, 9th Dist., Lorain No. 17CA011166, 2019-Ohio-2059 (5/28/2019), at ¶7.

addressed the merits of the motion for a new trial based on the Ohio Supreme Court's decision in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1591, which this Court found dispositive.

Of course, it goes without saying that in reaching the merits of the motion for a new trial, this Court *implicitly* determined that leave was appropriate and was granted.[2] Nevertheless, this Court should have explicitly addressed the predicate question and will do so now.

III. STATEMENT OF PERTINENT FACTS

The pertinent facts relevant to Jalowiec's motion for leave are not in dispute.

On April 11, 1996, this Court sentenced Jalowiec to death for his involvement in the murder of Ronald Lally. Since his conviction, Jalowiec has filed numerous appeals in both state and federal courts, petitions for post conviction relief, and petitions for habeas corpus – all which have been unsuccessful.

On January 12, 2016, the United States Supreme Court released its decision in the matter, *Hurst v. Florida*,[3] which invalided the State of Florida's death penalty scheme finding it unconstitutional.

On January 12, 2017, exactly one-year later, Jalowiec filed his motion for leave to file a motion for a new mitigation trial.

The State filed a brief in opposition arguing, among other things, that the motion for leave was untimely. Jalowiec replied, an oral hearing was had, and this Court issued its decision on June 7, 2017.

IV. ANALYSIS

THIS COURT FINDS, BY CLEAR AND CONVINCING EVIDENCE, THAT JALOWIEC WAS UNAVOIDABLY PREVENTED FROM FILING HIS MOTION FOR A NEW TRIAL WITHIN THE MANDATES OF CRIM. R. 33

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[2] This is particularly so in light of the Ninth District's decision in *State v. Jones*, 9th Dist., Summit No. 28547, 2019-Ohio-1870, a case almost identical to this one where remand was not ordered.

[3] Citations omitted.

As noted by the Ninth District, the State advances two arguments of untimeliness; first, that the motion is untimely since it was filed one-year after *Hurst* was decided; and two, that Jalowiec could have challenged the constitutionality of Ohio's sentencing laws prior to the *Hurst* decision by using existing case law as support since *Hurst* did not present new law.[4]

None of these arguments are convincing.

Regarding the timeliness of the motion for leave, it does not appear that either the Supreme Court or Ninth District have addressed the issue on point. The State directs this Court to the matter of *State v. Griffith,* 11th Dist., Trumbull No. 2005-T-0038, 2006-Ohio-2935 that stands for the proposition that ". . . case law has adopted a reasonableness standard . . ." and that ". . . a trial court may require a party to file his Crim. R. 33 motion within a reasonable time . . ." *Griffith, Id.*

The question then becomes, is a motion for a new trial based upon the holding of a Supreme Court case filed one-year after the case is decided unreasonable? To answer this question, Jalowiec relies upon a Tenth District Court of Appeals case, *State v. Burke,* 10th Dist., Franklin No. 03AP-1241, 2005-Ohio-891, where that court determined that a 17-month delay in filing for a new trial was not unreasonable.[5] *Id.* at ¶12.

On the other hand, there are cases that hold that a one-year delay in filing a *Hurst* motion for leave is excessive: *State v. Hale,* 8th Dist., Cuyahoga No. 107782, 2019-Ohio-1890, accord, *State v. Bryan,* 8th Dist., Cuyahoga No. 105774, 2018-Ohio-1190; *State v. Mundt,* 7th Dist., Noble No. 17 NO 0446, 2017-Ohio-7771.

Given the conflicting authority and no direct guidance from the Ninth District, this Court finds that the answer depends on the nature of the case and the reasons for the delay.

Here, Jalowiec cites no reasons for the delay in his motion or reply brief but at oral argument explained that *Hurst* represented ". . . a sea change in the understanding of jury's roles in sentencing."[6] Moreover, Jalowiec urged that he was awaiting a decision from the Ohio Supreme Court in the matter of *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, which would significantly influence him on how to proceed herein.[7]

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[4] In addition, the State also argues *res judicata.*

[5] Like this case, *Burke* is a death penalty case.

[6] Transcript of proceedings from oral hearing had 5/18/2017, Page 8, Lines 14-15.

[7] Transcript of proceedings from oral hearing had 5/18/2017, Pages 9-11.

Both of these arguments have merit.

More importantly, however, is the fact that this is a death penalty case. Everything moves more slowly in a death penalty case and the stakes, obviously, are high. Given the complexity of the *Hurst* decision and its possible impact on Ohio's death penalty scheme and the fact that Jalowiec wanted to know how *Kirkland* was decided, all mitigate the delay in filing for a new trial.

The State also urges *res judicata* in that Jalowiec has already argued ". . . various claims related to the penalty phase of his trial during his direct appeal . . ." and that Jalowiec ". . . could have raised these same issues in a motion for a new trial within the timeframe allotted by Crim. R. 33(B) since he raised them in his direct appeal."

Neither of these arguments are compelling.

Jalowiec seeks leave to file a motion for a new mitigation trial based upon a United States Supreme Court decision that struck down the State of Florida's death penalty statute – a statute eerily similar to Ohio's.[8] Jalowiec could not have possibly used *Hurst* to bolster his previous arguments as it was not in existence until January, 2016.

Accordingly, this Court finds, as a matter of law, that the one-year delay between the release of the *Hurst* decision and Jalowiec's filing of his motion for leave is not unreasonable and as such, leave must be granted.

Given that this Court has granted Jalowiec leave to file his motion for a new mitigation trial, the Court will now address the motion on the merits.

> FOR THE REASONS STATED IN THIS COURT'S ORDER AND JUDGMENT ENTRY FILED JUNE 7, 2017, WHICH ORDER IS HEREBY INCORPORATED HEREIN, AND THE SUPPLEMENTAL ANALYSIS AND AUTHORITY *INFRA*, JALOWIEC'S MOTION FOR A NEW MITIGATION TRIAL LACKS MERIT AND IS DENIED

Given that this Court has incorporated its previous analysis regarding the application of *Belton* to this case, it will not be reiterated herein. Suffice to say that *Belton* is controlling, Ohio's death penalty scheme is different from Florida's, and Ohio's death penalty statute, while perhaps immoral, highly impractical, incredibly expensive, arguably disproportionate in application to minorities and the poor[9], and rarely

---

[8] See: *State v. Rogers,* 28 Ohio St.3d 427, 430 (1986).

[9] Since July 14, 2009 (the last 10 years), Ohio has executed 27 men. 10, or 37%, were minorities yet minorities make up approximately 15% of Ohio's population.

imposed,[10] it is not unconstitutional based upon the United States Supreme Court's ruling in *Hurst.*

Moreover, multiple courts including the federal courts, the Ohio Supreme Court, numerous courts of appeal in Ohio, and the Ninth District Court of Appeals have all opined on this issue and have all rejected *Hurst* challenges to Ohio's death penalty statutes.

THE FEDERAL COURTS

In the matter of *Dunlap v. Paskett, Warden,* U.S. Dist. Ct., S.D. Ohio, Eastern Division, Case No. 1:99-cv-559, 2019 WL 1274862, 3/20/2019, the District Court held, "Petitioner's *Hurst*-based motions are DENIED. The Court analyzed Dunlap's *Hurst* claims and in reliance on *Belton* and its progeny determined that ". . . Petitioner's proposed *Hurst* claim is plainly without merit." *Id.* at *6.

THE OHIO SUPREME COURT

In addition to *Belton,* the Ohio Supreme Court decided *State v. Mason,* 153 Ohio St.3d 476, 2018-Ohio-1462, which in reliance on *Belton* against a *Hurst* challenge held,

1. State death-penalty scheme did not violate Sixth Amendment;
2. Weighing process contained in death-penalty statutes did not constitute fact-finding subject to Sixth Amendment right to jury trial;
3. Death-penalty scheme adequately afforded right to trial by jury during penalty phase; and
4. Statutes governing role of trial judge in death-penalty scheme did not violate Sixth Amendment right to jury trial.

And, in *State ex rel. O'Malley v. Collier-Williams,* 153 Ohio St.3d 553, 2018-Ohio-3154, the Ohio Supreme Court held relative to a *Hurst* challenge of the constitutionality of Ohio's death penalty statute that ". . . we have already rejected this interpretation of *Hurst.*" *Id.* at ¶20.

THE NINTH DISTRICT COURT OF APPEALS

The Ninth District has also addressed a *Hurst* challenge in a very recent, almost identical case, to wit: *State v. Jones,* 9th Dist., Summit No. 28547, 2019-Ohio-1870.

[10] The last execution in Ohio was July 18, 2018 (more than one-year ago), when Robert Van Hook was executed for the aggravated murder of David Self.

With great respect to the Ninth District, it is somewhat difficult for this Court to reconcile the decision in *Jones* with the Ninth's decision in *Jalowiec.*

The trial court in *Jones*, like this Court's original decision, failed to clearly enunciate the basis upon which it denied Jones leave to file his motion for a new trial. In *Jones,* the appellate court notes,

> Nonetheless, the trial court did not clarify whether it denied the motion for leave upon finding that Jones could not have been unavoidably delayed because the basis for his proposed motion was meritless, or whether, as Jones contends, the trial court disregarded Jones' unavoidable delay argument in support of his motion for leave and instead considered the merits of his proposed motion for a new trial. We determine, however, **that remand for clarification is unnecessary** since in the case of the former, the trial court would not have abused its discretion, and in the case of the latter, the trial court's error would be harmless.

Id. at ¶14. (Emphasis added.)

Ultimately, the trial court in *Jones* determined that based upon *Belton* and its progeny, Jones' *Hurst* claim lacked merit thus his motion for a new trial should be denied. In its review of the *Jones* decision, the Ninth District concluded,

> Accordingly, *assuming*[11] that the court denied the motion for leave on the basis that Jones did not present a meritorious basis for claiming unavoidable delay, we would not be able to say that the trial court abused its discretion. **Likewise, if we assume the trial court only considered the merits of his proposed motion, we would also not be able to say that the trial court abused its discretion, as that denial would be dispositive of the unavoidable delay issue.**

Id. at ¶16. (Emphasis added.)

Again, with great respect, this Court reached the identical conclusion as the trial court in *Jones* did, to wit: because Jalowiec's motion for a new trial lacked merit due to *Belton* and its progeny, whether or not the motion for leave was timely is irrelevant.

Regardless, the holding by the Ninth District in its *Jones* decision is highly instructive for this case. Whether this Court were to grant leave to file the motion for a new mitigation trial (which I have now done) or deny it is of no real consequence. Ultimately, *Belton*

[11] With respect, it is unclear why this same "assumption" was not accorded to this Court in its original *Jalowiec* decision.

and its progeny are dispositive and Jalowiec is not entitled to a new mitigation trial based upon his *Hurst* argument.

SISTER APPELLATE DISTRICTS

In addition to the compelling case law cited above, a number of the Ninth District's sister appellate courts have also addressed *Hurst* challenges to Ohio's death penalty scheme – all have reached the same result.

THE FIRST DISTRICT – HAMILTON COUNTY

In *State v. Carter,* 1st Dist., Hamilton No. C-170231, 2018-Ohio-645, the First District, relying on *Belton* held,

> Post–Hurst, the Ohio Supreme Court recognized that, unlike the Florida statute, under Ohio law "the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence," and therefore "it is not possible to make a factual finding during sentencing phase that will expose a defendant to greater punishment."

Id. at ¶8.

THE FOURTH DISTRICT – ROSS COUNTY

In *State v. Landrum,* 4th Dist., Ross No. 17CA3607, 2018-Ohio-1280, the Fourth District, relying on *Belton* (and other issues) held,

> Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, 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. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); **337 *State v. Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in 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. R.C. 2929.03(D)(2).

Id. at ¶19.

THE EIGHTH DISTRICT – CUYAHOGA COUNTY

In *State v. Hale,* 8th Dist., Cuyahoga No. 107782, 2019-Ohio-1890, the Eight District, relying on *Belton* and *State v. Bryan,* 8th Dist. Cuyahoga No. 105774, 2018-Ohio-1190, held,

> With regard to the substantive merit of the *Hurst* argument, we note that in *Bryan*, this court rejected a *Hurst* challenge to Ohio's death penalty scheme and stated:
>
> Post-*Hurst*, the Ohio Supreme Court recognized that, unlike the Florida statute, under Ohio law "the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence," and therefore "it is not possible to make a factual finding during sentencing phase that will expose a defendant to greater punishment." *State v. Belton* [citation omitted.]
>
> In other words, in Ohio a jury must first find a defendant guilty of an aggravating factor before the death penalty becomes a possibility.

Bryan, at ¶13.

THE TWELFTH DISTRICT – BUTLER COUNTY

In *State v. Williams,* 12th Dist., Butler No. CA2017-07-105, 2018-Ohio-1358, the Twelfth District held,

> Finally, every Ohio court of appeals that has addressed the effect of *Hurst* on Ohio's capital sentencing scheme as it existed when the court sentenced Williams has concluded that it is constitutional. *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, ¶ 29, appeal accepted, 149 Ohio St.3d 1462, 2017-Ohio-5699, 77 N.E.3d 987; *State v. Jackson*, 8th Dist. Cuyahoga No. 105530, 2018-Ohio-276, ¶ 16; *State v. Carter*, 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, ¶ 4–8; *see also State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, ¶ 9–10. Accordingly, this court overrules Williams' sole assignment of error.

Id. at ¶17.

To this Court's knowledge, every court in the State of Ohio, including the United States District Court for the Southern District of Ohio – Eastern Division that has addressed a *Hurst* challenge to the constitutionality of Ohio's death penalty statutes has found the argument unpersuasive.

So do I.

JALOWIEC'S ALTERNATE ARGUMENT THAT OHIO'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE

The gravamen of Jalowiec's argument that the facts of his case worsen the implications of *Hurst* turns on the premise that the court and attorneys at his trial emphasized that the role of the jury was ". . . only to recommend punishment, nothing more."[12]

This argument also lacks merit.

First, this issue is barred by the doctrine of *res judicata.*

As far back as Jalowiec's direct appeal in1998, he raised this very issue in his twelfth assignment of error. The Ninth District made short-shrift of this argument then and I do so now.

The Ninth held,

Twelfth Assignment of Error

> The argument to the jury that their decision is a mere recommendation is unacceptable as it diminishes the responsibility of the jury.
>
> In his twelfth assignment of error, Jalowiec contends that the trial court erred by referring to the jury's decision in the penalty phase of the trial as a "recommendation" during voir dire of the potential jurors, the guilt phase of the trial, the penalty phase, and in the court's instructions to the jury during the penalty phase. We disagree. "[T]he term 'recommendation' accurately reflects Ohio law and does not diminish the jury's sense of responsibility. There is no error, plain or otherwise." *State v. Moore* (1998), 81 Ohio St.3d 22, 37, 689 N.E.2d 1. (Citation omitted.) Jalowiec's twelfth assignment of error is overruled.

State v. Jalowiec, 9th Dist., Lorain No. 96CA006445, 1998 WL 178554, 4/15/1998.

Without reviewing all of the numerous appeals, petitions, and motions Jalowiec has filed over the years, it would come as no surprise if he unsuccessfully raised this issue subsequent to his initial appeal.

---

[12] Jalowiec's motion for new trial, Page 14, ¶F.

Regardless, there is nothing in the *Hurst* or *Belton* decisions that suggest that it is constitutionally problematic to inform potential jurors that the decision to impose death is a "recommendation" to the court. This was the law at the time Jalowiec was tried and convicted and remains the law today.

Moreover, the Ohio Supreme Court has repeatedly held that references by the court or attorneys to death penalty "recommendations" is not constitutionally cognizable.

For instance, in *State v. Stallings,* 89 Ohio St.3d 280, 2000-Ohio-164, the Supreme Court noted,

> In proposition of law VIII, defendant complains that the court erred by referring to the jury's penalty verdict as a recommendation. However, use of that term, while not preferred, accurately reflects Ohio law, does not diminish the jury's overall sense of responsibility, and does not constitute reversible error. (Citations omitted.)

Id. at ¶35.

Further, the Ohio Supreme Court more recently addressed this exact issue in the matter of *State v. Mason,* 153 Ohio St.3d 476, 2018-Ohio-1462, a case entirely on point (on this issue),

> While we uphold our conclusion in *Belton* that weighing is not a fact-finding process subject to the Sixth Amendment, we further conclude that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase. Mason contends that it does not, because the process permits a jury only to *recommend* a death sentence. *See* R.C. 2929.03(D)(2). Here, he emphasizes the statement in *Hurst* that "[a] jury's mere recommendation is not enough," —— U.S. ——, 136 S.Ct. at 619, 193 L.Ed.2d 504. But he fails to appreciate the material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst.*

Mason, at ¶30.

And,

> Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury an recommend a

death sentence. Ohio's scheme differs from Florida's because Ohio requires the jury to make this specific and critical finding.

Id. at ¶32.

Because there is nothing unique or novel about the manner in which Jalowiec was tried and convicted, and since his arguments herein have been repeatedly and thoroughly addressed, he suffered no constitutional infirmity at his sentencing and he is not entitled to a new mitigation trial.

V. CONCLUSION

This Court finds as a matter of law that Jalowiec's motion for leave to file a motion for a new mitigation trial is timely, that he has posited by clear and convincing evidence that he was unavoidably prevented from filing his motion for a new trial within the parameters of Crim. R. 33, and that the motion for leave is well-taken and hereby GRANTED.

As for the motion for a new trial, this Court finds that based upon *Belton* and its progeny, Jalowiec's *Hurst* argument lacks merit.

Finally, Jalowiec's alternative motion is *res judicata* and as there is nothing in the *Hurst* or *Belton* decisions that suggest that it is constitutionally problematic to inform potential jurors that the decision to impose death is a "recommendation," the motion for a new mitigation trial lacks merit on that basis as well.

Accordingly, Jalowiec's motion for a new mitigation trial is not well-taken and hereby DENIED.

IT IS SO ORDERED. No Record.

VOL _____ PAGE _____

JUDGE D. CHRIS COOK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX D TO WRIT OF CERTIORARI
State v. Jalowiec, 9th Dist. Lorain 17 CA011166,
2019-Ohio-2059, 2019 WL 22628676
(Intermediate Court of Appeals Remands to Consider As Applied Challenge)

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	
STATE OF OHIO		C.A. No. 17CA011166
Appellee		
v.		APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS
STANLEY JALOWIEC		COUNTY OF LORAIN, OHIO
Appellant		CASE No. 95CR046840

DECISION AND JOURNAL ENTRY

Dated: May 28, 2019

SCHAFER, Presiding Judge.

{¶1} Defendant-Appellant, Stanley Jalowiec appeals the judgment entry of the Lorain County Court of Common Pleas denying his motion for leave to file a motion for a new mitigation trial.

I.

{¶2} Jalowiec was sentenced to death in 1996 for the aggravated murder of R.L. This case has a long and complicated procedural history, the facts of which have been previously set out in *State v. Jalowiec*, 9th Dist. Lorain No. 14CA010548, 2015-Ohio-5042, ¶ 7-18 and *State v. Jalowiec*, 91 Ohio St.3d 220, 220-224 (2001). The Supreme Court of Ohio affirmed Jalowiec's conviction and sentence of death. *Jalowiec*, 91 Ohio St.3d at 240. The appellate history also includes: *State v. Jalowiec*, 9th Dist. Lorain No. 96CA006445; 1998 WL 178554 (Apr. 15, 1998) (direct appeal; affirming conviction); *State v. Jalowiec*, 9th Dist. Lorain Nos. 01CA007844, 01CA007847, 2002 WL 358637 (Mar. 6, 2002) (appeal of dismissal of motion for postconviction

relief and three subsequent amended motions for postconviction relief), appeal not accepted, 96 Ohio St.3d 1439, 2002-Ohio-3344; *Jalowiec v. Bradshaw*, N.D.Ohio No. 1:03 CV 0645, 2008 WL 312655 (Jan. 31, 2008) (denial of petition for writ of habeas corpus); *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir.2011) (affirming denial of writ of habeas corpus); *Jalowiec*, 2015-Ohio-5042 (affirming denial of motion for new trial), appeal not accepted, 149 Ohio St.3d 1405, 2017-Ohio-2822.

{¶3} In January 2017, Jalowiec filed a motion for leave to file a motion for a new mitigation trial pursuant to Crim.R. 33 and *Hurst v. Florida*, 136 S.Ct. 616 (2016). Attached to the motion was Jalowiec's proposed motion for a new mitigation trial. The State responded in opposition. The trial court ultimately denied the motion for leave to file the motion for a new mitigation trial.

{¶4} Jalowiec filed this timely appeal, raising two assignments of error for our review.

II.

Assignment of Error I

The trial court erred when it denied Jalowiec leave to file a motion for new trial seeking to assert a constitutional challenge to Ohio's death penalty scheme based on the United States Supreme Court Ruling in *Hurst*.

{¶5} In his first assignment of error, Jalowiec contends that the trial court abused its discretion when it denied him leave to file a motion for a new mitigation trial based on *Hurst* because his motion established by clear and convincing evidence that he was unavoidably delayed from presenting the basis for a new trial within fourteen days of the verdict in this case.

{¶6} Jalowiec filed his motion for leave to file a motion for a new mitigation trial pursuant to Crim.R. 33, which states that an application for a new trial shall be made by motion within fourteen days after the verdict is rendered, "unless it is made to appear by clear and

convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial * * *." This Court has recognized that "'[a]lthough a defendant may file his motion for a new trial along with his request for leave to file such motion, the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay.'" *State v. Gilliam*, 9th Dist. Lorain No. 14CA010558, 2014-Ohio-5476, ¶ 11, quoting *State v. Covender*, 9th Dist. Lorain No. 11CA010093, 2012-Ohio-6105, ¶ 13. Although a trial court may err by collectively entering judgment on a motion for leave to file and the motion for a new trial, such error may be harmless if the trial court's denial of the motion for new trial is dispositive of the unavoidable delay issue. *Gilliam* at ¶ 11.

{¶7} In support of his argument that he was unavoidably prevented from filing his motion within fourteen days of the verdict, Jalowiec argues that he was unavoidably prevented from filing his motion because the basis for the motion–the Supreme Court's decision in *Hurst*–was not decided until twenty years after he was sentenced. However, in denying Jalowiec's motion for leave, the trial court did not consider the issue of whether the motion for leave contained clear and convincing proof that he was unavoidably prevented from filing his motion. Rather, the trial court explicitly disregarded the requirements of Crim.R. 33(B) and instead, partially considered the merits of Jalowiec's attached motion for a new mitigation trial. Specifically, the trial court stated that it "need not address" whether the motion for leave was untimely or barred by res judicata because the matter could be resolved by considering whether the Supreme Court of Ohio had upheld the propriety of Ohio's death penalty sentencing scheme in light of *Hurst* when it decided *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581. The trial court determined it did uphold the propriety of Ohio's death penalty sentencing scheme and denied Jalowiec's motion for leave on that basis alone.

{¶8} Although the trial court explicitly declined to consider Crim.R. 33(B), Jalowiec contends in his first assignment of error that his motion for leave set forth clear and convincing evidence that he was unavoidably delayed from presenting the basis for a new trial since the Supreme Court's decision in *Hurst* was not decided until twenty years after he was sentenced. In response, the State argues that the motion for leave was untimely because it was filed a year after the Supreme Court's decision in *Hurst*, or in the alternative, that Jalowiec could have challenged the constitutionality of Ohio's sentencing laws prior to the decision in *Hurst* by using existing case law as support since *Hurst* did not present new law. *See, e.g.*; *State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771. Although neither Jalowiec nor the State address the fact that the trial court never ruled on this issue in their merit brief, the State urged this Court during oral argument to affirm the trial court's denial of Jalowiec's motion for leave to file a motion for a new mitigation trial since it is apparent from the record that the motion was untimely.

{¶9} Nevertheless, as a reviewing court, we decline to address in the first instance whether Jalowiec's motion for leave to file a motion for a new mitigation trial showed by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial on the basis outlined in his motion for leave as such a ruling would exceed our jurisdiction as an appellate court. *See Catalanotto v. Byrd*, 9th Dist. Summit No. 27824, 2016-Ohio-2815, ¶ 12. Additionally, even assuming without deciding that the trial court correctly determined that the Supreme Court of Ohio decision in *Belton* upheld the propriety of Ohio's death penalty sentencing scheme in light of *Hurst*, we note that when the trial court denied Jalowiec's motion, the court overlooked Jaloweic's alternative argument that the application of Ohio's capital sentencing statute was unconstitutional *as applied in this case*. Consequently, we cannot

consider the trial court's error in not considering whether Jalowiec was unavoidably delayed in filing his motion harmless in this case. *See Gilliam*, 2014-Ohio-5476 at ¶ 11.

{¶10} Therefore, Jalowiec's first assignment of error is sustained.

Assignment of Error II

Ohio's capital sentencing statutes are unconstitutional and violate the Sixth Amendment right to trial by jury because they require the judge, not a jury, to make the factual determinations of the elements necessary to support a sentence of death.

{¶11} In his second assignment of error, Jalowiec contends that Ohio's capital sentencing statutes are unconstitutional and violate the Sixth Amendment right to trial by jury because they require the judge, not a jury, to make the factual determinations of the elements necessary to support a sentence of death. Jalowiec further contends that the capital-sentencing scheme *as applied in this case* was unconstitutional due to the specific instructions given by the trial court to the jury. However, in light of our resolution of Jalowiec's first assignment of error we decline to address it.

III.

{¶12} Jalowiec's first assignment of error is sustained and we decline to address his second assignment of error. Therefore, the judgment of the Lorain County Court of Common Pleas is reversed this matter is remanded for further proceedings consistent with this decision.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

RICHARD A. CLINE, Senior Assistant Public Defender, and MICHELLE UMANA, Assistant Public Defender, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MATTHEW A. KERN, Assistant Prosecuting Attorney, for Appellee.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX E TO WRIT OF CERTIORARI
State v. Jalowiec, Lorain County Common Pleas
Case No. 95CR046840, June 6, 2017 Judgment Entry
(Trial Court's Initial Denial of Relief)

FILED
LORAIN COUNTY

2017 JUN -7 A 10:18

COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date June 5, 2017 Case No. 95CR046840

STATE OF OHIO
Plaintiff

Anthony Cillo & Laura Dezort
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

This matter is before the Court on Defendant's Motion For Leave to File a Motion For a New Mitigation Trial.

The Motion is not well-taken and is DENIED. See Judgment Entry.

IT IS SO ORDERED. No Record.

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JUDGE D. Chris Cook

cc: A. Cillo, Chief APA
L. Dezort, APA
R. Cline, Esq.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date June 5, 2017 Case No. 95CR046840

STATE OF OHIO
Plaintiff

Anthony Cillo & Laura Dezort
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

This matter is before the Court on Defendant's Motion For Leave to File a Motion For a New Mitigation Trial, filed January 12, 2017; the State's response in opposition, filed February 13, 2017; and, Defendant's Reply to State's Response to Defendant's Motion For Leave to File Motion For New Mitigation Trial, filed March 16, 2017.

Oral argument had on May 18, 2017.

The burden prerequisite to granting a Motion For a New Trial is upon the Defendant. A motion for new trial pursuant to Crim. R. 33 is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St. 3d 71.

In the case at bar, the Defendant seeks leave to file a motion for a new mitigation trial based primarily upon a relatively recent United States Supreme Court case finding Florida's death penalty sentencing scheme unconstitutional. See: *Hurst v. Florida* (2016), 136 S.Ct. 616. Defendant opines that as Ohio's sentencing scheme in death penalty cases is similar to Florida's, he should be granted leave to move for a new mitigation trial.

In its response brief, the State posits four main objections to Defendant's Motion for Leave, to wit: 1) this court lacks jurisdiction to even consider the Motion For Leave as the Defendant's previously filed Motion For New Trial is currently pending on appeal for certiorari in the Ohio Supreme Court; 2) the motion is untimely filed and barred by *res judicata;* 3) as *Hurst, supra,* was decided in January, 2016, and Defendant's Motion For Leave was filed one-year later, in January, 2017, Defendant's delay in filing the Motion For Leave is "unreasonable," and; 4) the Ohio Supreme Court has upheld the propriety of Ohio's sentencing scheme in death penalty cases in light of *Hurst* when it decided the

matter of *State v. Belton,* 2016-Ohio-1581, which found Florida's death penalty scheme inapposite to Ohio's.

The Court will address the issues *seriatim.*

1) THE TRIAL COURT LACKS JURISDICTION TO CONSIDER THE MOTION AS THIS CASE IS ON APPEAL TO THE OHIO SUPREME COURT

On May 17, 2017, the day before the oral argument in this matter, the Ohio Supreme Court declined to accept jurisdiction of Defendant's appeal on Case No. 14CA010548. As such, this issue is moot and the matter may proceed to decision on the merits.

2) THE MOTION IS UNTIMELY FILED AND BARRED BY *RES JUDICTA*

Because this matter can be resolved based upon the analysis in Item "4" below, the Court need not address this argument.

3) AS *HURST*[1] WAS DECIDED IN JANUARY, 2016 AND DEFENDANT'S MOTION FOR LEAVE WAS FILED ONE-YEAR LATER, IN JANUARY, 2017 THE DELAY IN FILING IS "UNREASONABLE"

Because this matter can be resolved based upon the analysis in Item "4" below, the Court need not address this argument.

4) THE OHIO SUPREME COURT HAS UPHELD THE PROPRIETY OF OHIO'S SENTENCING SCHEME IN DEATH PENALTY CASES IN LIGHT OF *HURST* WHEN IT DECIDED *BELTON*[2]

On January 12, 2016, the United States Supreme Court found the State of Florida's sentencing scheme unconstitutional in death penalty cases holding, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst* at ¶619.

Florida's death penalty sentencing scheme failed constitutional muster because it provided that a judge could impose death even where the jury did not find the aggravating circumstances to exist prior to judicial consideration. Put another way, a judge in Florida could *increase* the defendant's sentence to death even where a jury did not make such a finding.

---

[1] 136 S. Ct. 616 (2016)
[2] 2016-Ohio-1581

Ohio's death penalty sentencing scheme, however, is different. In Ohio, *the jury* must find the requisite aggravating circumstances to exist beyond a reasonable doubt before a judge may impose death. The judge may then accept the recommendation and impose death or reduce the penalty to a term in prison (with or without) the possibility of parole. As such, in Ohio, the trial judge is unable to increase the penalty recommended by the jury, but may only reduce it.

In relying on *Hurst* to move for a new mitigation trial, the Defendant fails to explain why the Ohio Supreme Court's decision in *State v. Belton,* 2016-Ohio-1581, which was decided on April 20, 2016, three months after *Hurst,* is not dispositive.

In *Belton,* the Ohio Supreme Court distinguished Ohio's death penalty sentencing scheme from Florida's. In analyzing *Apprendi*[3], *Ring*[4] and their progeny, the Ohio Supreme Court held, "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, 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." *Belton,* at ¶59.

The *Belton* court further distinguished Ohio's sentencing scheme from Florida's holding, "Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment . . . in 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." *Belton* at ¶59.

Ohio's approach, unlike Florida's (and Arizona's) has been directly commented on favorably by the United States Supreme Court. In *Ring, supra,* the high-court stated, ". . . the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." *Ring* at ¶608. See also: *Ring* at Footnote 6, to wit: "Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries." Ohio is included in this reference.

This Court would further note, parenthetically, that if the Motion for a new mitigation trial was granted, very little, if anything would change procedurally between the mitigation trial held over 21 years ago and the trial that would be held today. Ohio's death penalty sentencing statute remains constitutionally sound and practically unchanged. As the

[3] *Apprendi v. New Jersey* (2000), 530 U.S. 466.
[4] *Ring v. Arizona* (2002), 536 U.S. 584

process and procedure mandated for a mitigation trial is essentially identical today to what occurred in 1996, the effort by Defendant to seek a new mitigation trial is, for all practicable purposes, an attempt to re-litigate that which has already been decided and upheld on review by multiple courts.

This Court has reviewed the Motion, Response, Reply, the applicable case law and has considered the oral arguments of the parties. Given the foregoing, and in particular that the Ohio Supreme Court in *Belton* found Ohio's death penalty sentencing scheme constitutionally sound in light of *Hurst,* this Court can find no reason advanced by *Hurst* or otherwise that would justify granting the Defendant a new mitigation hearing.

Accordingly, Defendant's Motion For Leave to File a Motion For a New Mitigation Trial is not well-taken and is hereby DENIED.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX F TO WRIT OF CERTIORARI
Ohio Rev. Code Ann. § 2929.03 (1995)
Imposing sentence for a capital offense;
procedures; proof of relevant factors; alternative sentences

Ohio Rev. Code § 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised code, the verdict shall separately state whether the accused is found guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon request of the defendant, shall require a pre-sentence investigation to be made and, upon the

request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the factors in mitigation of the imposition of the sentence of death.

(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. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the jury recommends that the offender be sentence to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(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. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes a sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within

fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v § 1 (Eff 10-19-81); 146 v S 4, Eff. 9-21-95.