No. 21-5232
Capital Case

In the Supreme Court of the United States

DUANE SHORT, Petitioner

v.

STATE OF OHIO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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This is a Capital Case

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RESTATEMENT OF THE CASE

After his wife left him, Petitioner Duane Short became so enraged that he tracked her down in a town two counties away, borrowed his boss's truck and put on a disguise, enlisted his teenage son's help in sawing the barrel off a shotgun, then went to his estranged wife's newly-rented home and shot her male friend before busting down the bathroom door and shooting his wife in the chest. For his crimes, Short was indicted by an Ohio grand jury on three counts of aggravated murder with aggravating circumstances specifications, along with counts of breaking and entering, aggravated burglary, unlawful possession of a dangerous ordinance, and six firearm specifications. He was found guilty on all counts and specifications. App. B, A-3. Following further deliberations, the jury found unanimously that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, and recommended a sentence of death. App. B, A-3. The trial court adopted the jury's recommendation and sentenced Short to death. App. B, A-3. On direct appeal to the Supreme Court of Ohio, Short's conviction and death sentence was affirmed. *State v. Short*, 129 Ohio St.3d 360, 952 N.E.2d 1121 (2011).

While his direct appeal was pending, Short filed with the trial court a petition for post-conviction relief, which he later amended nine times over the course of the next six-and-a-half years. The trial court overruled Short's petition, and Ohio's Second District Court of Appeals affirmed the trial court's decision. Both the Supreme Court of Ohio and this Court declined to accept the matter for further

review. *See State v. Short*, 154 Ohio St.3d 1430, 111 N.E.3d 1191 (2018), *cert. denied* 139 S.Ct. 2013 (May 13, 2019).

Back in the trial court, Short filed a motion asking for leave to file a motion for a new mitigation trial under Rule 33 of the Ohio Rules of Criminal Procedure. App. B, A-3; App. C. Short based his motion on *Hurst v. Florida*, 577 U.S. 92 (2016), in which this Court found that Florida's capital punishment structure violated the Sixth Amendment right to have a jury determine a capital defendant's eligibility to be sentenced to death. App.B, A-3 and A-8. In Short's mind, Ohio's capital punishment structure suffers from the same deficiencies as Florida's and should, therefore, be struck down for the same reasons outlined in *Hurst*. The trial court disagreed and so did Ohio's Second District Court of Appeals. App. B, A-4 and A-8. The Supreme Court of Ohio declined to accept jurisdiction over Short's appeal of the court of appeals' decision. App. A

Short's petition for writ of certiorari is now before this Court for consideration.

REASONS FOR DENYING THE PETITION

To what extent, if any, does this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), apply to entitle Ohio capital defendants to a new mitigation trial because of an alleged violation of the defendant's Sixth Amendment right to have a jury make the findings necessary to support a sentence of death? This question has come before the Ohio Supreme Court on several occasions, and each time that court has concluded that *Hurst* has no application in Ohio. Duane Short seeks a writ of certiorari because he does not like that answer, despite the soundness of the Ohio Supreme Court's legal

analysis and the obvious differences between Ohio's and Florida's capital sentencing structure. This Court's further review of the state courts' legal and factual determinations is unwarranted.

The Ohio Supreme Court first addressed the issue, in part, in *State v. Belton*, 149 Ohio St.3d 165, 74 N.E.3d 319 (2016), when it suggested that *Hurst* had no application to Ohio's capital-sentencing scheme because Ohio's scheme does not suffer from the same constitutional flaws as the Florida scheme at issue in *Hurst*. *Id*. at 176, 74 N.E.3d at 336-337. The question was later answered head-on in *State v. Mason*, 153 Ohio St.3d 476, 108 N.E.3d 56 (2018), where the Ohio Supreme Court found that, unlike the Florida capital-sentencing scheme held unconstitutional in *Hurst*, "Ohio's death-penalty scheme * * * does not violate the Sixth Amendment," because Ohio's scheme " requires the critical jury findings [before a sentence of death can be imposed] that were not required by the laws in * * * *Hurst*." *Id*. at 482, 108 N.E.3d at 62. Since then, the Ohio Supreme Court has relied on its holding in *Mason* on at least nine occasions to reject the argument that Ohio's capital-sentencing structure violates the Sixth Amendment right to a jury trial as construed in *Hurst*.[1]

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1 *See, e.g., State v. Froman*, 162 Ohio St.3d 435, 466, 165 N.E.3d 1198, 1231 (2020); *State v. Hundley*, 162 Ohio St.3d 509, 535, 166 N.E.3d 1066, 1091 (2020); *State v. Ford*, 158 Ohio St.3d 139, 226, 140 N.E.3d 616, 709 (2019); *State v. Tench*, 156 Ohio St.3d 85, 135-136, 123 N.E.3d 955, 1005 (2018); *State v. Goff*, 154 Ohio St.3d 218, 225, 113 N.E.3d 490, 497 (2018); *State v. Wilks*, 154 Ohio St.3d 359, 400, 114 N.E.2d 1092, 1134-1135 (2018); *State ex rel. O'Malley v. Collier-Williams*, 153 Ohio St.3d 553, 557-558, 108 N.E.3d 1082, 1087 (2018); *State v. Worley*, __ Ohio St.3d __, __ N.E.3d __, 2021 WL 2692212 (July 1, 2021). *See also State v. Graham*, __ Ohio St.3d __, __ N.E.3d __, 2020 WL 7391565 (December 17, 2020) (declining defendant's request that *Mason* be overturned).

And the Supreme Court of Ohio is correct in distinguishing Ohio's capital sentencing scheme from the Florida scheme outlawed in *Hurst*. This Court ruled in *Hurst* that Florida's death penalty scheme was an unconstitutional infringement on a defendant's Sixth Amendment right to a jury trial because it requires the trial judge, and not the jury, to find the existence of aggravating circumstances before a sentence of death can be imposed. *Id*., 577 U.S. at 102-103. But Ohio's scheme has no similarity to Florida's at all. As the Ohio Supreme Court has explained:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This entitles criminal defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring* [*v. Arizona*, 536 U.S. 584, 589 (2002)]. *See also Hurst* [577 U.S. at 619] ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). Ohio's death-sentence scheme satisfies this right.
>
> When an Ohio capital defendant elects to be tried by a jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and–unlike the juries in *Ring* and *Hurst*–the aggravating-circumstance specifications for which the offender was indicted. [Ohio Rev. Code § 2929.03(B)]. Then the jury–again unlike in *Ring* and *Hurst*–must "unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was

> found guilty of committing outweigh the mitigating factors." [Ohio Rev. Code § 2929.03(D)(2)]. An Ohio jury recommends a death sentence only after it makes this finding. *Id.* And without that recommendation by the jury, the trial court may not impose the death sentence.
>
> Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. *See* [Ohio Revised Code § 2929.03(C)(2)]. Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment.

Mason, 153 Ohio St.3d at 481-482, 108 N.E.3d at 62-63.

Despite the Ohio Supreme Court's repeated conclusion that Ohio's death-penalty scheme is distinctively different from the Florida scheme found unconstitutional in *Hurst*, Short nevertheless makes the extraordinary claim that "the Ohio Supreme Court has long recognized that Ohio's capital sentencing statutes are 'remarkably similar' to the Florida statutes invalidated by *Hurst* and have consistently interpreted Ohio's law to acknowledge that trial judges play this unconstitutional role." (*cert. petition* at p. 9) He attempts to back up that claim by citing *State v. Rogers*, 28 Ohio St.3d 427, 504 N.E.2d 52 (1986).

To be sure, the Ohio Supreme Court did comment in *Rogers* that Ohio's and Florida's schemes were "remarkably similar." *Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d at 55. But the court later clarified in *Mason* that "*Rogers* involved a different question [than what was confronted in *Hurst*]. * * * *Rogers* noted that the systems are similar in that they both allow for jury recommendations; it did not consider the

findings that the jury was required to make before recommending a sentence." *Mason*, 153 Ohio St.3d at 486, 108 N.E.3d at 66. Indeed, a capital defendant who sought to rely on *Rogers* to argue that Ohio's capital sentencing statute was "remarkably similar" to Florida's was chastised in federal district court for "ripping language out of context and using it to prove a proposition not intended by the author." *Gapen v. Robinson*, S.D. Ohio No. 3:08-cv-280, 2017 WL 3524688 *3 (Aug. 15, 2017) (quoting Mag. Judge Merz). Short's reliance of *Rogers,* therefore, is "not only unconvincing, it is unsupported by law." *Id.*

Finally, although Short never made an Eighth Amendment argument in the court of appeals below, he cites here to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in suggesting that his rights under the Eighth Amendment were violated because the jury was instructed that its sentencing verdict was only a recommendation, thereby "diminishing the jury's sense of personal responsibility for its verdict[.]" (*cert. petition* at pp. 9-10) But Short is wrong: the jury was never told or instructed during the sentencing-phase of the trial that its verdict was only a recommendation.[2] This additional contention by Short is unfounded as well.

Simply stated, Duane Short's attacks on the validity of the jury's sentencing verdict are as meritless now as they were when he made them originally and, as the

[2] On pages 3 and 4 of his Petition, Short quotes comments made by his counsel and the trial judge to a small groups of prospective jurors during the preliminary voir dire. But it is unclear how many, if any, of the prospective jurors who heard these comments were ultimately seated on the jury. Nevertheless, after the jury had rendered its verdicts in the trial-phase and were given instructions during the sentencing-phase of trial, the jury was not told or instructed that its verdict was only a recommendation. See generally Tr. 2493-2496, 2513-2526.

Ohio Supreme Court has repeatedly found, this Court's decision in *Hurst v. Florida* did nothing to change that fact. The state courts did not err, therefore, in overruling Short's motion for a new mitigation trial.

CONCLUSION

In view of the foregoing law and argument, Duane Short's petition for writ of certiorari should be denied.

Respectfully submitted,

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