

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DONNA ROBERTS,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI

Donna Roberts respectfully petitions this Court for a writ of certiorari to review the judgment of the Ohio Supreme Court, which affirmed her death sentence.

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CAPITAL CASE

QUESTIONS PRESENTED

1) In Ohio the law unambiguously requires that an offender be given an opportunity for allocution whenever a trial court imposes a sentence at a sentencing hearing. *State v. Campbell*, 90 Ohio St.3d 320, 738 N.E.2d 1178 (2000), paragraph one of the syllabus.

In determining whether to impose a death sentence, and weighing mitigation against factors in aggravation, can the trial court give effective weight to the mitigation and impose a sentence consistent with this Court's dictates under the constitution without actually witnessing the defendant's allocution?

2) Is the Sixth Amendment, as this Court explicated it in *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016), violated when a defendant is sentenced to death by a judge who did not preside over her trial, never took testimony, never heard evidence, but simply reviewed the record of a trial and of sentencing proceedings conducted by another judge and made findings regarding what mitigating factors were proved, what they weighed, and what the aggravating circumstances weighed, and whether the aggravating circumstances outweighed the mitigating factors?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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A. In determining whether to impose a death sentence, and weighing mitigation against factors in aggravation, the trial court cannot give effective weight to the mitigation and impose a sentence consistent with this Court’s dictates under the constitution without actually witnessing the defendant’s allocution.	
B. The Sixth Amendment, as this Court discussed in <i>Hurst v. Florida</i> , 577 U.S. ___, 136 S.Ct. 616 (2016), is violated when a defendant is sentenced to death by a judge who did not preside over her trial, never took testimony, never heard evidence, but instead reviewed the record of a trial and of sentencing proceedings conducted by another judge and made findings regarding what mitigating factors were proved, what they weighed, what the aggravating circumstances weighed, and whether the aggravating circumstances outweighed the mitigating factors.	
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OPINIONS BELOW

The decisions of the Ohio Supreme Court: (1) *State v. Roberts*, 137 Ohio St.3d 230, 998 N.E.2d 1100, 2013 Ohio 4580 (Oct. 22, 2013) (Pet. App. 1-16); (2) *State v. Roberts*, 111 Ohio St.3d 71, 850 N.E.2d 1168, 2006-Ohio-3665 (Aug. 2, 2006) (Pet. App. 17-3239-74); (3) *State v. Roberts*, 150 Ohio St.3d 47, 78 N.E.3d 851, 2017-Ohio-2998 (2017) (Pet. App. 33-46). A motion for reconsideration was denied. *Case Announcements*, 150 Ohio St.3d 1411, 2017-Ohio-6964 (2017) (Pet. App. 47).

JURISDICTION

Petitioner is appealing the most recent ruling of the Supreme Court of Ohio, *State v. Roberts*, 150 Ohio St.3d 47, 78 N.E.3d 851, 2017-Ohio-2998. A timely motion for reconsideration was denied without opinion. *Case Announcements*, 150 Ohio St.3d 1411, 2017-Ohio-6964 (July 26, 2017). The time for filing the petition was extended by Justice Kagan up to and including December 8, 2017. Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 2003, Donna Roberts was tried and sentenced to death for her participation in her husband's murder. On direct appeal, the Ohio Supreme Court affirmed her conviction but vacated her death sentence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168 (2006) (*Roberts I*). There were two reasons:

- 1) The trial judge, in preparing his statutorily mandated sentencing opinion identifying his findings regarding mitigating factors and explaining how he weighed the aggravating circumstances against the mitigating factors, did not act independently, but worked *ex parte* with the prosecutor.
- 2) The trial judge neither permitted nor considered any allocution by Ms. Roberts.

The court remanded the case with specific instructions to the trial judge to allow Ms. Roberts her right of allocution and to “personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating

evidence, and determine anew the appropriateness of the death penalty.” The judge was also to prepare “an entirely new penalty opinion.” *Id.* at ¶ 167.

The judge again imposed a death sentence. Again the Ohio Supreme Court vacated that sentence. *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100 (*Roberts II*). The court found that although Ms. Roberts was allowed to and did allocate, the judge did not consider her allocution in making the findings necessary to impose death. The court remanded the case for a new judge, the prior judge having died, *id.* at ¶ 78, to review the record, make findings, write an opinion explaining the findings, and impose a sentence.

Specifically, the court ordered the judge “to review the entire record.” The judge was not, however, to take any further evidence or hear any allocution. Rather, from the cold record, the judge was “to determine in the first instance what mitigating factors, if any, are present in the case, and what weight, if any, they should be given. *Id.* at ¶¶ 73-75. The judge’s findings and determination were to be “independent,” without any “deference to the sentences previously entered.” *Id.* at ¶ 96.

The new judge, as ordered, refused to hear or consider any additional evidence or allocution. Rather, and relying on the cold record, he made findings regarding what weight to give to aggravating circumstances, what mitigating factors were proved, what weight to give them, and what the weighing showed. Like the previous judge, he imposed a death sentence.

Ms. Roberts again appealed to the Ohio Supreme Court. During the pendency of the appeal, and after the briefing was concluded, this Court issued its opinion in *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016). Counsel filed a notice of additional authority and argued the relevance and significance of *Hurst* at oral argument. <http://www.ohiochannel.org/video/case-no-2014-0989-state-v-roberts> The court affirmed while specifically declining to rule on the *Hurst* issue. *State v. Roberts*, 150 Ohio St.3d 47, 78 N.E.3d 851, 2017-Ohio-2998, ¶ 84-85 (Roberts III).

Ms. Roberts filed a motion for reconsideration addressing the *Hurst* issue. The motion was denied without explanation or opinion. *Case Announcements*, 150 Ohio St.3d 1411, 2017-Ohio-6964 (July 26, 2017).

REASONS FOR GRANTING THE WRIT

A. Compromised Consideration of Allocution

Ohio is among the many states and jurisdictions that afford the defendant a right to allocution – the right to explain, apologize, or beg for mercy before sentencing. Allocution is supposed to be “much more than an empty ritual: It represents a defendant’s last opportunity to plead his case or express remorse” *State v Green*, 90 Ohio St. 3d 352, 738 N.E.2d 1208 (2000). In capital cases, in particular, allocution may save the defendant’s life. This Court has observed that even “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” *Green v. United States*, 365 U.S. 301, 304 (1961). Donna Roberts was denied that right.

The Ohio Supreme Court remanded Donna Roberts' case because the trial court had previously imposed a death sentence without giving any weight to her allocution. On remand, the trial court was instructed to review the record of Roberts' case and re-write its sentencing opinion while considering and giving effect to possible mitigation contained in the allocution. The original sentencing judge, however, had passed away. At Roberts' resentencing, his replacement reviewed a transcript of Ms. Roberts' previous allocution, forbidding her from speaking. Thus he was unable to observe her allocution; and could not properly assess the weight to be provided to either the aggravating factors or the mitigation factors already part of the record. Moreover, because he never heard any witness testify, he could not have accurately determined their credibility. We defer to trial courts findings on appeal because they are the ones who see and hear the witnesses. No such deference is due here. Though Ms. Roberts faced the ultimate penalty, the process she received was wholly inadequate.

This Court has recognized that the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987). "Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302, 327-328 (1989).

In *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court held that “the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death.” *Id.* at 604 (emphasis in original). See *Woodson v. North Carolina*, 428 U.S. 280 (1976). If *Lockett* means what it says, then Roberts’ sentencing – which required the judge to weigh allocution without seeing/hearing or observing it in any fashion – improperly infringed on Roberts’ right to present and have mitigation considered. The death sentence that followed was necessarily unconstitutional.

B. Ohio’s Sentencing Scheme is Unconstitutional under *Hurst*

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court recognized that the Sixth Amendment requires juries, not judges, to find the facts that increased sentences beyond what a basic guilty verdict allowed. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that the principles of *Apprendi* applied to capital sentencing. In *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016), this Court expanded on the principles set forth in *Apprendi* and *Ring* and held that a jury needs to find every fact necessary to impose a sentence of death. Judicial fact-finding will not satisfy the Sixth Amendment. And “[a] jury’s mere recommendation is not enough.” *Id.* at 619.

Ohio’s death penalty system, like the Florida system found unconstitutional in *Hurst*, has a penalty phase trial. At that second trial, the jury which found the

presence of at least one aggravating circumstance weighs the aggravator against any mitigation it finds. The jury then sends a recommendation to the trial judge regarding whether death should be imposed. If the jury's recommendation is death, the judge then must "separate[ly] and independent[ly]"¹ determine what mitigating factors have been proved and what weight they and the aggravating circumstances should be given. The judge must weigh the aggravator against any mitigating factors the judge found to have been proved. If and only if *the judge* makes the finding that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt is it possible for the defendant to be sentenced to death. Ohio Rev. Code § 2929.03(D).

While there are narrow, and Petitioner Roberts maintains insignificant in this context, differences between Florida's unconstitutional system and the Ohio system, the facts of this case magnify the similarities and demonstrate that Ohio's system violates the Sixth Amendment.

In 2003, a jury found Ms. Roberts guilty of aggravated murder with death specifications and after a penalty phase trial recommended that she be sentenced to death. The trial judge denied her the opportunity to allocute and, in *ex parte* consultation with the prosecutor, made findings regarding mitigating factors, the weight to be accorded to those factors and to the aggravating circumstances, conducted the weighing, and imposed a death sentence.

¹ *State v. Buell*, 22 Ohio St.3d 124, 144, 489 N.E.2d 795 (1986).

That sentence was vacated because the judge should have allowed Ms. Roberts to allocute and should not have worked with the prosecutor in crafting his findings and opinion. *Roberts I* at ¶¶ 164-166. On remand, the judge heard allocution but ignored it in his fact-finding. Accordingly, the case was remanded for new fact-finding to be based exclusively on the already-created record. *Roberts II* at ¶ 96.

However, the trial judge, the one who'd heard the trial and penalty phase evidence and heard and seen the allocution had died. *Id.* at ¶ 78. As a consequence, the new fact-finding, including making determinations regarding the credibility and veracity of Ms. Roberts allocution, was to be conducted by a judge who had never seen or heard a moment of the trial or the allocution. Rather, he was to decide the case, find the facts, and impose sentence based entirely on paper review. In April 2014 he sentenced Ms. Roberts to death, adding an opinion setting forth and explaining his findings in June 2014. The Ohio Supreme Court affirmed. *Roberts III.*

The Sixth Amendment, we now understand from *Hurst*, requires a jury not a judge to find every fact necessary for a death sentence to be imposed. In part, we understand that is so because the jury is both the conscience and the voice of the community. More, the collective judgment of laymen is constitutionally preferred to the singular and rarefied perspective of a judge. We expect of the jury human passion and understanding. We ask of the judge cold and dispassionate logic.

The Sixth Amendment chooses the humanity of the jury. Its “mere recommendation” is insufficient. Its perception and view must control. In Ohio, they do not. The Ohio jury offers a recommendation, but the judge must - and must independently - find the facts that allow the imposition of a death sentence.

This, then, is the paradigmatic case for application of *Hurst* to Ohio’s death penalty law. While an 11-year-old jury recommendation lurked in the background, a judge who never saw or heard a live witness and never heard Ms. Roberts allocute “made a careful and independent review of the record, including Roberts’s first and second allocutions. Upon this review, the Court [found] the aggravating circumstances outweigh the mitigating factors by proof beyond a reasonable doubt.” Sentencing Entry (Apr. 30, 2014).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that three copies of the enclosed Petition for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari were served via the United State's Postal Service, on this 8th day of December, 2017 upon:

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APPENDIX