

CAPITAL CASE

No. 17-_____

In the Supreme Court Of the United States

LEE EDWARD MOORE,

Petitioner,

v.

STATE OF OHIO, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - QUESTIONS PRESENTED

In *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), this Court held that the Sixth Amendment “requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” Petitioner’s jury did not unanimously find the existence of the aggravating circumstance, the eligibility factor under Ohio law. The Ohio Supreme Court agreed that there was error – but attempted to cure it by implying such a finding. This raises the following question:

Whether the Sixth Amendment requires a jury, not a appellate court, to make the requisite eligibility finding necessary to impose a sentence of death?

RULE 29.6 STATEMENT

All parties to the proceedings are named in the caption of the case.

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LEE EDWARD MOORE,

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STATE OF OHIO, Warden,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lee Edward Moore respectfully prays that a Writ of Certiorari issue to review the judgment entry of the Supreme Court of Ohio entered in this case.

OPINIONS BELOW

The Supreme Court of Ohio’s original opinion is reported at *State v. Moore*, 689 N.E.2d 1 (Ohio 1998). App. 2-15. On March 14, 2018, the Supreme Court of Ohio denied Petitioner’s *Hurst* Motion, which is unreported. App. 1.

JURISDICTIONAL STATEMENT

The Ohio Supreme Court ruled on March 14, 2018. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The Sixth Amendment reads in the pertinent part: “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... .”

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment provides in relevant part: “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

The relevant history of this case is simple:

Petitioner’s jury never made a legally appropriate finding as to the existence of the aggravating circumstance that rendered Petitioner death eligible. The Ohio Supreme Court specifically found the same.

The Ohio Supreme Court held that the jury’s findings were flawed in that they were not unanimous as to the existence of an aggravating circumstance:

With regard to the court’s instructing the jury on both principal offender and prior calculation and design, such an instruction is proper if the alternatives are given to the jury disjunctively in the same specification. [*State v. Cook*, [] 605 N.E.2d [70] 82-83 [(Ohio 1992)]. **The court erred in not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of.**

Moore, 689 N.E.2d at 17. (emphasis added). After recognizing the jury’s failure to make an adequate finding on the aggravating circumstance, the Ohio Supreme Court held the error to be harmless by substituting a jury finding from a different count. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE OHIO SUPREME COURT FAILED TO GIVE EFFECT TO *HURST* AND THEREBY HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. SUP. CT. R. 10(C).

A. Only A Jury Can Make A Finding Each Fact Necessary To Impose A Sentence Of Death.

In *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016), the Court struck down Florida's capital sentencing procedure because it delegated to the judge, not the jury, the responsibility of finding each fact necessary for imposition of the death penalty. Specifically, the *Hurst* court held that a defendant's Sixth Amendment right to jury trial is impermissibly violated where, as here, the court replaces the jury's capital fact-finding with its own. *Hurst*, 136 S. Ct. at 622 (holding that a defendant's Sixth Amendment jury trial right was violated where the judge, rather than the jury, makes findings about the existence and weight of aggravating circumstances).

Florida had a "hybrid" procedure by which the jury (1) determined if the State had proven an aggravating circumstance; (2) weighed the aggravating and mitigating circumstances; and (3) recommended whether the defendant should be sentenced to death. *Id.* at 620; 625 (Alito, J., dissenting). In considering the jury's recommendation, the trial court duplicated the steps taken by the jury. *Id.* at 625 (Alito, J., dissenting). Then, the trial court independently made findings regarding whether the State had proven the aggravating circumstances; weighing the aggravating and mitigating circumstances; and deciding whether the defendant would live or die. *Id.* at 620; *see also* 625 (Alito, J., dissenting).

In striking down Florida's statute, this Court definitively stated that the Sixth Amendment right to trial by jury, together with the Fourteenth Amendment's Due Process Clause, required that "each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621

(citing *Alleyne v. United States*, 570 U.S. 99, 104 (2013)). A jury must find the facts “necessary to sentence a defendant to death.” *Hurst*, 136 S.Ct. at 621 (citing *Ring v. Arizona*, 536 U.S. 584, 591 (2002)). The Court concluded that Florida courts had erred in not requiring the jury to find the “critical findings necessary to impose the death penalty.” *Hurst*, 136 S.Ct. at 622. Instead, the judge played a “central and singular role.” *Id.* Florida impermissibly required the trial court alone to find the facts “[t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” *Hurst*, 136 S.Ct. at 622. The jury did not make specific factual findings “with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.” *Id.* at 622. Without jury-made findings, the only sentence Hurst could have received was life without parole. *Id.* This Court held that Florida impermissibly increased the authorized punishment by its own findings and thereby violated the Sixth Amendment. *Id.* Moreover, the Court rejected Florida’s argument that the judge’s finding of an aggravator “only provides the defendant additional protection.” *Id.*

In Mr. Moore’s case, the Ohio Supreme Court does exactly what this Court proscribed in *Hurst*. That is, the Court put itself in the mind of the jury and determined for the jury what it would have found if the jury had been properly instructed regarding the alternative aggravators. Thus, what the Ohio Supreme Court did in Moore’s case is no different in substance from what *Hurst* found to contravene the Sixth Amendment’s guarantee of a jury determination regarding *all facts* that are necessary to support a sentence of death.

Allowing an appellate court to replace the jury in a capital sentencing trial contravenes the core principles underlying the right to trial by jury, a right deemed “fundamental to the American scheme of justice.” *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (quoting *Duncan v. Louisiana*,

391 U.S. 145, 149 (1968)). Denial of the right to trial by jury in turn threatens a capital defendant's right to be free from cruel and unusual punishment under the Eighth Amendment and due process under the Fourteenth.

Trial by jury also enhances the fairness and reliability of the sentencing determination and thus ensures due process under the Fourteenth Amendment. Nowhere is the need for trial by jury more compelling than at a death penalty trial. Because the stakes are so high, the Court has recognized "an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J.).

Because of the importance of the right to trial by jury and its correlation to other constitutional rights, this Court has historically been vigilant to curb any encroachment. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury, not judge, must find defendant acted with biased purpose in order for hate crime sentencing enhancement to apply); *Ring*, 536 U.S. 584 (jury, not judge, must find existence of aggravating circumstances beyond a reasonable doubt); *Hurst*, 136 S.Ct. 616 (jury, not judge, must find any fact necessary for imposition of death penalty); *Alleyne*, 570 U.S. 99 (jury, not judge, must find fact of whether defendant brandished firearm before sentence could be enhanced); and *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016) (trial court cannot make determination about factual basis of prior conviction in sentencing defendant under the ACCA).

The imposition of the death penalty represents the most profound and irreversible finding of any judicial proceeding. The Ohio Supreme Court's unconstitutional actions in Mr. Moore's case require the same exercise of this Court's vigilance of constitutional protections that it exercised by granting to petition for certiorari in *Hurst*, and reversing the imposition of the death

sentence. In a spare one paragraph Order, the Ohio Supreme dismisses without any analysis *Hurst's* obvious application to Mr. Moore's case. Such action by the Ohio's highest court cries out for review by this Court.

B. As A Matter of Ohio Law, Ohio Capital Jurors Perform the Narrowing And Eligibility Function Via The Finding Of An Aggravating Circumstance.

In Ohio, before jurors may consider imposing a death sentence, they must find that the State has proven at least one statutory aggravating circumstance beyond a reasonable doubt. Ohio Rev. Code 2929.04(A) ("Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt.") Indeed, "[i]n Ohio, a capital case does not proceed to the sentencing phase until after the factfinder has found a defendant guilty of one or more aggravating circumstances...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." *State v. Belton*, 74 N.E.3d 319, 336-337 (2016). Consequently, according to Ohio's post-*Lockett* authority, the jury's finding of an aggravating circumstance serves the two important Constitutional purposes of narrowing¹ and determining eligibility. *State v. Henderson*, 528 N.E.2d 1237, 1242-43 (Ohio 1988) ("It requires the jury to consider at the guilt phase whether the crime falls into a specific category justifying capital punishment."); *State v. Jenkins*, 473

¹ In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. *Id.* at 177. Specifically, a state may choose either to legislatively limit the definition of death-eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating circumstances during the penalty phase. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1987).

N.E.2d 264, 280 (1984) (Ohio’s statutory aggravating circumstances serve to “narrow[] the class of homicides in Ohio for which the death penalty becomes available as a sentencing option.”)

C. Petitioner’s Jury Never Made The Eligibility Determination – Never Properly Finding The Existence Of An Aggravating Circumstance.

Petitioner’s jury never made a legally appropriate finding as to the existence of the aggravating circumstance that rendered Petitioner death eligible. This Court must defer to the Ohio Supreme Court’s finding of the same: “The court erred in not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of.” *Moore*, 689 N.E.2d at 17. Thus, there has never been an appropriate finding by a jury of death eligibility under Ohio law, as recognized by the Ohio Supreme Court. *Hurst* forecloses the Ohio Supreme Court’s effort to step into the shoes of the jury and make such a finding in the first instance itself.

D. The Ohio Appellate Court Subverted *Hurst* In An Attempt To Repair The Failure of Petitioner’s Jury To Have Made The Eligibility Determination.

One of the core procedural safeguards required by the Sixth, Eighth and Fourteenth Amendments is that juries, not judges, should be responsible for the decision to impose the death penalty. This Court definitively stated that the Sixth Amendment right to trial by jury, together with the Fourteenth Amendment’s Due Process Clause, required that “each element of a crime be proved to a jury beyond a reasonable doubt.” *Hurst*, 136 S.Ct. at 621. The 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. The Ohio Supreme Court displaced the jury’s constitutional function in Mr. Moore’s case, rendering its decision to impose a sentence of death a violation of the of Mr. Moore’s right to trial by jury on the most critical elements of his case. Rather than protecting that right, the Ohio Supreme Court failed to give effect to this Court’s authority.

Thereby, the Ohio Supreme Court has decided an important federal question that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for writ of certiorari. Alternatively, this Court should grant, vacate and remand for a consideration of Petitioner's case in light of *Hurst*.

Respectfully Submitted,



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