

No. 17-9425

IN THE

SUPREME COURT OF THE UNITED STATES

LEE EDWARD MOORE

Petitioner

vs.

STATE OF OHIO, WARDEN

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT
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QUESTIONS PRESENTED

I

WAS *HURST V. FLORIDA*, 577 U.S. ___, 136 S.CT. 616, 193 L.ED.2d 504 (2016), VIOLATED WHERE A JURY UNANIMOUSLY FOUND MOORE COMMITTED MURDER WITH PRIOR CALCULATION AND DESIGN – A FINDING THAT RENDERED MOORE DEATH-ELIGIBLE UNDER OHIO LAW?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption. Under Rule 29.6, Respondent states that no parties are corporations.

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I

OHIO'S DEATH PENALTY STATUTORY SCHEME DOES NOT VIOLATE *HURST V. FLORIDA*, 577 U.S. ___, 136 S.CT. 616, 193 L.ED.2d 504 (2016), BECAUSE THE JURY MAKES THE FACTUAL FINDINGS MAKING A DEFENDANT DEATH-ELIGIBLE – NOT A COURT. THE JURY HERE FOUND MOORE COMMITTED THE MURDER WITH PRIOR CALCULATION AND DESIGN – THE ELEMENT RENDERING MOORE DEATH-ELIGIBLE.

II

THE IMPROPER JURY INSTRUCTION ABOUT ALTERNATIVE AGGRAVATORS IDENTIFIED BY MOORE DOES NOT CHANGE THE ANALYSIS. THE JURY (NOT A COURT) DETERMINED MOORE COMMITTED THE MURDER WITH PRIOR CALCULATION AND DESIGN – A FINDING RENDERING DEFENDANT DEATH-ELIGIBLE.

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OPINIONS BELOW

At issue in this petition is the Ohio Supreme Court's denial of Moore's motion for relief on March 14, 2018. *State v. Moore*, (Moore's Petition, App. 1).

JURISDICTIONAL STATEMENT

Petitioner Moore claims jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Sixth Amendment to the U.S. Constitution, which provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

This case implicates the Eighth Amendment to the United States Constitution, which provides:

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

This case also implicates the Fourteenth Amendment to the United State Constitution, which provides in pertinent 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 law.

The Ohio Statutory provision relevant to this petition is Ohio Rev. Code Ann. § 2929.03 (1993).

STATEMENT OF THE CASE AND FACTS

Moore appeals from the Ohio Supreme Court's denial of his motion for order of relief on March 14, 2018.

Moore kidnapped and murdered Melvin Olinger. A grand jury indicted Moore on three counts of aggravated murder, one count of aggravated robbery, and one count of kidnapping. All counts carried a firearm specification. All three aggravated murder counts carried three death-penalty specifications: (1) aggravated murder to escape detection for kidnapping and/or aggravated robbery [R.C. 2929.04(A)(3)]; (2) aggravated murder committed in connection with kidnapping where Moore either was the principal offender or committed the aggravated murder with prior calculation and design [R.C. 2929.04(A)(7)]; and (3) aggravated murder committed in connection with aggravated robbery where Moore either was the principal offender or committed the aggravated murder with prior calculation and design [R.C. 2929.04(A)(7)]. After deliberation, the jury found Moore guilty as charged.

Prior to the mitigation hearing, the trial court merged the three death specifications of Count 1 (aggravated murder committed with prior calculation and design) into one specification: murder to escape detection for kidnapping and/or aggravated robbery. The court also merged the two felony murder counts into one count and merged the three specifications attached to these counts into two: murder during kidnapping and murder during aggravated robbery.

The jury recommended death, and the court imposed the death penalty. Upon appeal, the court of appeals affirmed the convictions and sentence of death.

Moore then appealed to the Ohio Supreme Court, in part, arguing that the court erred in submitting to the jury both alternatives to the aggravating circumstances set forth in R.C.

2929.04(A)(7) (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.

Moore argued that the trial court erred by not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of. The Ohio Supreme Court agreed, but found the error harmless, because the guilty verdict on Count One indicated unanimous agreement that Moore committed the murder with prior calculation and design. *State v. Moore*, 689 N.E.2d 1, 1998 Ohio Lexis 26, 1998-Ohio-441, 81 Ohio St.3d 22 (1998).

REASONS FOR DENYING THE WRIT

I

OHIO'S DEATH PENALTY STATUTORY SCHEME DOES NOT VIOLATE *HURST V. FLORIDA*, 577 U.S. ___, 136 S.Ct. 616, 193 L.ED.2d 504 (2016), BECAUSE THE JURY MAKES THE FACTUAL FINDINGS MAKING A DEFENDANT DEATH- ELIGIBLE – NOT A COURT. THE JURY HERE FOUND MOORE COMMITTED THE MURDER WITH PRIOR CALCULATION AND DESIGN – THE ELEMENT RENDERING MOORE DEATH-ELIGIBLE.

II

THE IMPROPER JURY INSTRUCTION ABOUT ALTERNATIVE AGGRAVATORS IDENTIFIED BY MOORE DOES NOT CHANGE THE ANALYSIS. THE JURY (NOT A COURT) DETERMINED MOORE COMMITTED THE MURDER WITH PRIOR CALCULATION AND DESIGN – A FINDING RENDERING DEFENDANT DEATH-ELIGIBLE.

Moore's case does not warrant this Court's jurisdiction as *Hurst* is inapplicable to Ohio's death penalty statutory scheme.

In *Hurst*, this Court held that Florida's death sentencing procedures violated the Sixth Amendment right to trial by jury under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

From the outset the Ohio Supreme Court has emphatically and repeatedly rejected claims that *Hurst* applies to Ohio's statutory death penalty scheme. *State v. Belton*, 2016-Ohio-1581, ¶'s 59-60; *State v. Mason*, Marion Co. App. No. 9-16-34, 2016-Ohio-8400; *State v. Sheppard*, 1st Dist. Hamilton Nos. C-950402, C-950744, 2016-Ohio-7681; *State v. Fears*, 1st Dist. Hamilton C.P. No. B9702360B, 2016-Ohio-7681; *State v. Myers*, 2nd Dist. Greene No. 96CA38, 2016-Ohio-7681; and, *State v. Gapen*, 2nd Dist. Greene C.P. No. 2000CR02945, 2016-Ohio-7681 (See Ohio Supreme Court Case Announcements, 2016-Ohio-7681).

Recently, the Ohio Supreme Court made clear that these determinations that Ohio's death-penalty statutes do not contravene *Hurst* were not dictum. In *State v. Mason*, 2018-Ohio-1462, 2018-WL-1872180, the Ohio Supreme Court specifically held that Ohio's death-penalty scheme is not unconstitutional under *Hurst* nor does it violate the Sixth Amendment. *Id.*

Moreover, the "legally inappropriate" jury instruction does not change the analysis. As the Ohio Supreme Court found in Moore's case:

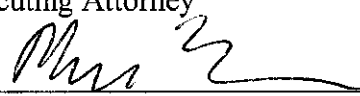
"With regard to the court's instructing the jury on both principal offender and prior calculation and design, such an instruction is proper if the alternatives are given to the jury disjunctively in the same specification. *Cook, supra*, 65 Ohio St.3d at 527, 605 N.E.2d at 82-83. The court erred in not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of. Such error is harmless, since the guilty verdict on Count 1 indicated unanimous agreement that Moore committed the murder with prior calculation and design. See *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 653 N.E.2d 242, 248. The twenty-third proposition of law is rejected."

In short, an Ohio jury found Moore acted with prior calculation and design – a finding that rendered Moore death-eligible. Moore's case differs from *Hurst* because the record is clear that Moore's jury found beyond a reasonable doubt that he acted with prior calculation and design – the requisite element rendering him death-eligible.

CONCLUSION

Moore's petition for certiorari is properly denied.

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